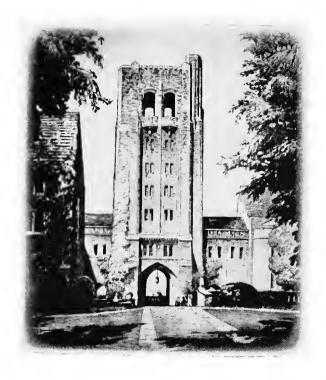


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AMERICAN

CASES ON CONTRACT

ARRANGED IN ACCORDANCE WITH THE ANALYSIS OF ANSON ON CONTRACT AND EDITED

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PREFACE.

THIS volume is the outcome of a need experienced in the classes of a professional law school on the one hand, and the undergraduate classes of a university on the other. It is an additional proof of the value of law as a culture study, as well as a professional study, that the editors have encountered no difficulty in uniting in a selection of cases equally suited to both purposes. The admirable analysis by Sir William Anson in his "Principles of the English Law of Contract" has been followed in the arrangement of the cases. That work, prepared originally for undergraduate study at Oxford, has been found highly valuable in the professional schools of this country, and is everywhere recognized as a masterly exposition of the subject. is believed, however, that the cases will be found equally well adapted for use with any of the elementary treatises, or in connection with lectures, or without either text or lectures.

The selection is confined to American cases because the limits of a single volume did not admit of an adequate representation of both English and American decisions, and because excellent collections of English cases are already available. It is believed, moreover, that the decisions of the Federal courts, and the courts of the various States, now afford for the American law student a sufficient number of illustrative cases that are adequate in content, and that possess the additional value of being stated in

iv PREFACE.

terms reflecting the character and procedure of our own courts. The frequent, and often exhaustive discussion of English authorities in the cases selected, as well as in the leading treatises, removes all danger of losing sight of the fountain sources of our law.

Subjects commonly treated at length in related courses—as the Statute of Frauds, capacity of parties, and interpretation of contract—have been much abridged, the object being to indicate the trend of judicial decision without attempting to develop details or refinements. Compression at these points has permitted a fuller illustration of difficult or disputed topics, and the addition of some special topics not indicated by Anson, as substantial performance, joint obligations, and laws impairing the obligation of contracts. The subject of agency has been omitted altogether. Notes have been added where it seemed impracticable to develop a subject fully by the use of cases.

In many of the cases it has been thought advisable, for the sake of brevity, to rewrite or abridge the statement of facts, and this has been done without calling special attention to the matter. Portions of opinions on points irrelevant to the subject illustrated are often omitted, but such omissions are clearly indicated. Every citation in the opinions has been verified, and corrections made where the original is manifestly wrong. It is hoped that the addition of a full index may render the volume of service to practitioners as well as students.

E. W. H.

E. H. W.

Остовек, 1894.

TABLE OF CONTENTS.

-----o;esco-----

PART I.

INTRODUCTION.

PAGE

	PART II.	
	FORMATION OF CONTRACT.	
	CHAPTER I.	
	OFFER AND ACCEPTANCE.	
SECT	ION	
1.	Contract springs from acceptance of offer.	
	White v. Corlies, 46 N. Y. 467	7
	Gorham's Adm'r v. Meacham's Adm'r, 63 Vt. 2319,	88
2.	Offer and acceptance may be made by words or conduct.	
	Fogg v. Portsmouth Athenæum, 44 N. H. 115	10
3.	Offer must be communicated.	
	(i.) Ignorance of offered promise.	
	Fitch v. Snedaker, 38 N. Y. 248	62
	Dawkins v. Sappington, 26 Ind. 199	65
	(ii.) Ignorance of offered act.	
	Bartholomew v. Jackson, 20 Johns. 28	14
	(iii.) Ignorance of offered terms.	
		15
	Malone v. Boston & Worcester R., 12 Gray, 388	19
4.	Acceptance must be communicated.	
	White v. Corlies, 46 N. Y. 467	7
	Royal Ins. Co. v. Beatty, 119 Pa. St. 6	21
	Hobbs v. Massasoit Whip Co., 158 Mass. 194	24
	9	2 6
5.	What amounts to communication of acceptance.	
	Tayloe v. Merchants' Fire Ins. Co., 9 How. 390	29

SECT		PAGE
6.	Offer may lapse or be revolved.	
	(i.) Lapse.	
	a. Lapse by death.	
	Pratt v. Trustees, 93 Ill. 475	35
	b. Lapse by failure to accept in prescribed manner.	
	Eliason v. Henshaw, 4 Wheat. 225	38
	c. Lapse by expiration of time.	
	Maclay v. Harvey, 90 Ill. 525	41
	Minnesota Oil Co. v. Collier &c. Co., 4 Dillon, 431	46
	(ii.) Revocation.	
	a. Offer may be revoked before acceptance.	40
	Fisher v. Seltzer, 23 Pa. St. 308	49
	White v. Corlies, 46 N. Y. 467	50, 7
	b. Offer made irrevocable by acceptance.	F 0
	Cooper v. Lansing Wheel Co., 94 Mich. 272	50
	c. Offer under seal irrevocable.	E 4
	McMillan v. Ames, 33 Minn. 257	54
		57
7	Coleman v. Applegarth, 68 Md. 21	91
١.	(i.) Offer of rewards.	
	Fitch v. Snedaker, 38 N. Y. 248.	62
	Dawkins v. Sappington, 26 Ind. 199.	65
	(ii.) Invitations to treat.	00
	Moulton v. Kershaw, 59 Wis. 316	67
8.	Offer must contemplate legal relations.	V1
-•	Keller v. Holderman, 11 Mich. 248	71
	McClurg v. Terry, 21 N. J. Eq. 225	72
	Sherman v. Kitsmiller, 17 S. & R. 45	
9.	Acceptance must be absolute.	
	Minneapolis &c. R. v. Columbus Rolling Mill, 119 U. S. 149	74
	CHAPTER II.	
	FORM AND CONSIDERATION.	
1.	Contract of record.	
	O'Brien v. Young, 95 N. Y. 428	76
2.	Contract under seal.	
	Aller v. Aller, 40 N. J. L. 446	82
	Bender v. Been, 78 Ia. 283	87
	Gorham's Adm'r v. Meacham's Adm'r, 63 Vt. 231	88
3.	Statute of frauds.	
	(i.) Requirements of form.	
	Bird v. Munroe, 66 Me. 337	92
	O'Donnell v. Leeman, 43 Me. 158	
	Clason v. Bailey, 14 Johns, 484	102

TABLE OF CONTENTS.

SECT	ION	PAGE
3.	Statute of Frauds — continued.	
	(ii.) Provisions of fourth section.	
	Bellows v. Sowles, 57 Vt. 164	110
	May v. Williams, 61 Miss. 125	113
	Heyn v. Philips, 37 Cal. 529	118
	Peters v. Westborough, 19 Pick. 364	120
	(iii.) Provisions of seventeenth section.	
	Northern v. State, 1 Ind. 113	123
	Hirth v. Graham, 50 Ohio St. 57	124
	Goddard v. Binney, 115 Mass. 450	127
	Greenwood v. Law, 55 N. J. L. 168	
4.	Consideration.	
	(i.) Necessity of Consideration.	
	Cook v. Bradley, 7 Conn. 57	133
	(ii.) Adequacy of consideration.	
	Schnell v. Nell, 17 Ind. 29	138
	Devecmon v. Shaw, 69 Md. 199	141
	Hamer v. Sidway, 124 N. Y. 538	143
	Three tests of reality of consideration.	
	a. Did the promisee suffer any detriment?	
	Fink v. Cox, 18 Johns. 145	150
	Cases under Part III. Ch. I. § 2	42 0
	b. Was the detriment of any ascertainable value?	
	(a) Prima facie impossibility.	
	Beebe v. Johnson, 19 Wend. 500	152
	Stevens v. Coon, 1 Pinney, 356	155
	(β) Uncertainty.	
	Sherman v. Kitsmiller, 17 S. & R. 45	157
	(γ) Forbearance to sue.	
	Penn. Coal Co. v. Blake, 85 N. Y. 226	162
	Foster v. Metts, 55 Miss. 77	164
	(δ) Compromise.	
	Russell v. Cook, 3 Hill, 504.	165
	(ϵ) Gratuitous undertakings.	1.05
	Thorne v. Deas, 4 Johns. 84	167
	c. Was the detriment more than the promisee was legally	
	bound to suffer?	
	(a) Delivering property wrongfully withheld.	3 27 4
	Tolhurst v. Powers, 133 N. Y. 460	174
	(β) Performance of public duty.	170
	Smith v. Whildin, 10 Pa. St. 39	176
	(γ) Promise to perform existing contract.	100
	Coyner v. Lynde, 10 Ind. 282	177 180
	Endriss v. Belle Isle Ice Co., 49 Mich. 279	181
	Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578	101
	Johnson's Adm'r v. Sellers' Adm'r, 33 Ala. 265	185
	(δ) Payment of smaller sum in satisfaction of larger.	10
	Jattray v. Davis, 124 N. I., 104	101

DEC.	104	
4.	Consideration — continued.	
	(ϵ) Composition with creditors.	
	Williams v. Carrington, 1 Hilt. 515	195
	Perkins v. Lockwood, 100 Mass. 249	197
	(iii.) Legality of consideration	199
	(iv.) Past consideration. Dearborn v. Bowman, 3 Met. 155	199
	Mills v. Wyman, 3 Pick. 207.	201
	(a) Consideration moved by previous request.	201
	Hicks v. Burhans, 10 Johns. 242	205
	(β) Voluntarily doing what another was legally bound	200
	to do.	
	Gleason v. Dyke, 22 Pick. 390	206
	(γ) Reviving agreement barred by rule of law.	
	Dusenbury v. Hoyt, 53 N. Y. 521	208
	Shepard v. Rhodes, 7 R. I. 470	
	·	
	CHAPTER III.	
		
	CAPACITY OF PARTIES.	
1.	Political status.	
	United States v. Grossmayer, 9 Wall. 72	215
2.	Infants.	
	Trueblood v. Trueblood, 8 Ind. 195	218
	Trainer v. Trumbull, 141 Mass. 527	
3.	Corporations.	
	Slater Woollen Co. v. Lamb, 143 Mass. 420	222
4.	Lunatics and drunken persons.	
	Gribben v. Maxwell, 34 Kans. 8	224
	Barrett v. Buxton, 2 Aikens, 167	228
5.	Married women.	
	Wells v. Caywood, 3 Colo. 487	233
	CHAPTER IV.	
	REALITY OF CONSENT.	
	ADDALL OF CONSERT.	
1.	Mistake.	
	(i.) As to nature or existence of contract.	
	Walker v. Ebert, 29 Wis. 194	2 38
	(ii.) As to identity of person with whom contract is made.	
	Boston Ice Co. v. Potter, 123 Mass. 28	243
	(iii.) As to subject-matter of contract.	
	a. As to identity of subject-matter.	0.46
	Kyle v. Kavanagh, 103 Mass. 356	246

ï	w
L	А

TABLE OF CONTENTS.

ECT	ON	PAGE
1.		
	b. As to existence of subject-matter.	
	Gibson v. Pelkie, 37 Mich. 380	247
	Sherwood v. Walker, 66 Mich, 568	249
	Hecht v. Batcheller, 147 Mass. 335	255
	Wood v. Boynton, 64 Wis. 265	257
	Rovegno v. Defferari, 40 Cal. 459	261
	c. As to intention, known to other party.	
	Shelton v. Ellis, 70 Ga. 297	262
2.	Misrepresentation.	
	(i.) Distinguished from fraud	265
	(ii.) Distinguished from terms.	
	Davison v. Von Lingen, 113 U. S. 40	265
	(iii.) Effects of misrepresentation.	
	a. In contracts generally.	
	Wilcox v. Iowa Wesleyan Univ., 32 Ia. 367	268
	School Directors v. Boomhour, 83 Ill. 17	271
	Woodruff v. Saul, 70 Ga. 271	272
	b. In contracts uberrimæ fidei.	
	Walden v. Louisiana Ins. Co., 12 La. 134	273
	Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183	275
	(iv.) Remedies for misrepresentation: estoppel.	
	Stevens v. Ludlum, 46 Minn. 160	280
3.	Fraud.	
	(i.) Essential features.	
	a. It is a false representation.	
	Laidlaw v. Organ, 2 Wheat. 178	
	Grigsby v. Stapleton, 94 Mo. 423	285
	b. It is a representation of fact.	
	Fish v. Cleland, 33 Ill. 237	288
	Ross v. Drinkard's Adm'r, 35 Ala. 434	291
	Dawe v. Morris, 149 Mass. 188	292
	Sheldon v. Davidson, 85 Wis. 138	295
	c. Made with knowledge of falsity, or recklessly.	
	Chatham Furnace Co. v. Moffatt, 147 Mass. 403	298
	McKown v. Furgason, 47 Iowa, 636	301
	d. Made with intent that it be acted upon by person injured.	
	Stevens v. Ludlum, 46 Minn. 160	
	Hunnewell v. Duxbury, 154 Mass. 286	303
	e. It must actually deceive.	000
	Lewis v. Jewell, 151 Mass. 345	306
4.	Duress.	000
	Morse v. Woodworth, 155 Mass. 233	308
5.	Undue influence.	,
	Hall v. Perkins, 3 Wend. 626	311

CHAPTER V.

LEGALITY OF OBJECT.	
SECTION	PAGE
1. Nature of illegality in contract.	
(i.) Contracts illegal by statute.	
a. General rules of construction.	04.5
Pangborn v. Westlake, 36 Iowa, 546	315
b. Contracts in breach of Sunday statutes.	040
Handy v. St. Paul Globe Pub. Co., 41 Minn. 188	318
Reynolds v. Stevenson, 4 Ind. 619	322
c. Wagers in general.	
Love v. Harvey, 114 Mass. 80	324
d. Wagers on rise and fall of prices.	00.
Mohr v. Miesen, 47 Minn. 228	
Harvey v. Merrill, 150 Mass. 1	383
e. Wagering policies.	000
Warnock v. Davis, 104 U. S. 775	333
(ii.) Contracts illegal at common law.	
a. Agreements to commit indictable offense or civil wrong.	000
Materne v. Horwitz, 101 N. Y. 469	338
b. Agreements to do what it is policy of law to prevent.	
(a) Agreements tending to injure the State with other States.	017
United States v. Grossmayer, 9 Wall. 72340,	
Graves v. Johnson, 156 Mass. 211	991
(β) Agreements tending to injure the public service.	940
Trist v. Child, 21 Wall. 441	340
Southard v. Boyd, 51 N. Y. 177	347
(γ) Agreements tending to pervert the course of justice.Partridge v. Hood, 120 Mass. 403	348
Hamilton v. Liverpool &c. Ins. Co., 136 U. S. 242	351
(a) Agreements tending to abuse of legal process.	991
Ackert v. Barker, 131 Mass. 436	354
(ε) Agreements contrary to good morals.	004
Boigneres v. Boulon, 54 Cal. 146	257
Kurtz v. Frank, 76 Ind. 594	
(3) Agreements affecting the freedom or security of mar-	000
riage.	
Sterling v. Sinnickson, 2 South. 756	359
Duval v. Wellman, 124 N. Y. 156361,	
Cross v. Cross, 58 N. H. 373	
(η) Agreements in restraint of trade.	001
Diamond Match Co. v. Roeber, 106 N. Y. 473	362
Bishop v. Palmer, 146 Mass. 469372,	
Santa Clara &c. Co. v. Hayes, 76 Cal. 387372,	
2. Effect of illegality upon contracts.	2,0
(i.) When contract is divisible.	
Erie Ry. Co. v. Union Loc. & Exp. Co., 35 N. J. L. 240	373
Santa Clara &c. Co. v. Hayes, 76 Cal. 387	
V 7	

	TABLE OF CONTENTS.	хi
еот 2.		PAGE
	(ii.) When contract is indivisible. Bixby v. Moor, 51 N. H. 402 Bishop v. Palmer, 146 Mass. 469 (iii.) Comparative effects of avoidance and illegality.	378 380
	Harvey v. Merrill, 150 Mass. 1	383
	Tyler v. Carlisle, 79 Me. 210	390 391
	Brown v. Kinsey, 81 N. C. 245. New v. Walker, 108 Ind. 365. (vi.) Relief from contract known to be illegal.	395 399
	Duval v. Wellman, 124 N. Y. 156. Bernard v. Taylor, 23 Ore. 416.	402 407
	PART III.	
	THE OPERATION OF CONTRACT.	
	CHAPTER I.	
	THE LIMITS OF THE CONTRACTUAL OBLIGATION.	
1.	.	
	(i.) Paying another's debt.Crumlish's Adm'r v. Cent. Imp. Co., 38 W. Va. 390(ii.) Inducing breach of contract.	412
	Walker v. Cronin, 107 Mass. 555	416 418
2.	Third party acquiring rights. Lehow v. Simonton, 3 Colo. 346	420 422
	Bassett v. Hughes, 53 Wis. 319	428 430 435
	CHAPTER II.	
	THE ASSIGNMENT OF CONTRACT.	
1.	Assignment by act of parties. (i.) Assignment of liabilities. Arkansas &c. Co. v. Belden &c. Co., 127 U. S. 379	438

xii	TABLE OF CONTENTS.	
SECT	Assignment by act of parties — continued.	PAGE
1.	(ii.) Assignment of rights.	
	a. At common law.	
	Heaton v. Angier, 7 N. H. 397	442
	McKinney v. Alvis, 14 Ill. 33	
	Compton v. Jones, 4 Cow. 13	
	Jessel v. Williamsburgh Ins. Co., 3 Hill, 88	
	Hough v. Barton, 20 Vt. 455	445
	Rochester Lantern Co. v. Stiles &c. Co., 135 N. Y. 209	447
	Hayes v. Willio, 4 Daly, 259	451
	b. In equity.	
	Carter v. United Ins. Co., 1 Johns. Ch. 463	
	Field v. Mayor, 2 Seld. 179	
	Heermans v. Ellsworth, 64 N. Y. 159	457
	c. By statute.	450
	Allen v. Brown, 44 N. Y. 228	459
	d. By the law merchant: negotiability. Shaw v. Railroad Co., 101 U. S. 557	460
9	Assignment by operation of law.	400
2.	(i.) Assignment of obligations upon transfer of interests in land.	
	a. Leasehold interests.	
	Gordon v. George, 12 Ind. 408	468
	Fisher v. Deering, 60 Ill. 114	
	b. Freehold interests.	
	Shaber v. St. Paul Water Co., 30 Minn. 179	472
	Middlefield v. Church Mills Knitting Co., 160 Mass. 267	476
	(ii.) Assignment of obligations upon marriage.	
	Platner v. Patchin, 19 Wis. 333	
	Howarth v. Warmser, 58 Ill. 48	479
	(iii.) Assignment of obligations by death.	450
	Dickinson v. Calahan's Adm'rs, 19 Pa. St. 227	479
	CHAPTER III.	
	JOINT OBLIGATIONS.	
1	Joint promises.	
1.	(i.) Joint promisors.	
	Bragg v. Wetzell, 5 Blackf. 95	486
	Hale v. Spaulding, 145 Mass. 482	487
	Jeffries v. Ferguson, 87 Mo. 244	489
	(ii.) Joint promisees.	
	Sweigart v. Berk, 8 S. & R. 308	49 0
2.	Joint and several promises.	
	(i.) Joint and several promisors.	
	Cummings v. The People, 50 Ill. 132	
	Bangor Bank v. Treat, 6 Greenl. 207	
	May v. Hanson, 6 Cal. 642	496

	TABLE OF CONTENTS.	xiii
	on Joint and several promises — continued. (ii.) Joint or several promisees.	PAGE
	Willoughby v. Willoughby, 5 N. H. 244 Boggs v. Curtin, 10 S. & R. 211	
	PART IV.	
	THE INTERPRETATION OF CONTRACT.	
	CHAPTER I.	
	Rules Relating to Evidence.	
2.	Proof of document. Story v. Lovett, 1 E. D. Smith, 153 Colby v. Dearborn, 59 N. H. 326 O'Donnell v. Leeman, 43 Me. 158 Evidence as to fact of agreement. Reynolds v. Robinson, 110 N. Y. 654 Evidence as to terms of contract. a. Supplementary and collateral terms. Wood v. Moriarty, 15 R. I. 518 503, Thurston v. Arnold, 43 Ia. 43 504, b. Explanation of terms. Ganson v. Madigan, 15 Wis. 144. c. Usages of trade. Soutier v. Kellerman, 18 Mo. 509.	501 100 502 430 515 504
	CHAPTER II.	
	Rules Relating to Construction.	
1. 2.	General Rules. Reed v. Ins. Co., 95 U. S. 23	
	Thurston v. Arnold, 43 Ia. 43	515 517

PART V.

DISCHARGE OF CONTRACT.

CHAPTER I.

	DISCHARGE OF CONTRACT BY AGREEMENT.	
SECT		PAGE
1.	Waiver.	
_	Collyer v. Moulton, 9 R. I. 90	522
2.	Substituted contract.	
	McCreery v. Day, 119 N. Y. 1	524
3.	Provisions for discharge.	* 01
	Moore v. Phœnix Ins. Co., 62 N. H. 240	
	Ray v. Thompson, 12 Cush. 281	034
	CHAPTER II.	
	DISCHARGE OF CONTRACT BY PERFORMANCE.	
1.	Payment.	
	Ford v. Mitchell, 15 Wis. 304	536
2.		
	Knight v. Abbott, 30 Vt. 577	541
3.	Substantial performance.	
	Nolan v. Whitney, 88 N. Y. 648	542
	Gillespie Tool Co. v. Wilson, 123 Pa. St. 19	
	Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387	
	Adams Radiator &c. Works v. Schnader, 155 Pa. St. 394	54 9
	CHAPTER III.	
	DISCHARGE OF CONTRACT BY BREACH.	
1.	Position of party discharged by breach.	
	Dermott v. Jones, 2 Wall. 1	555
2.		
	(i.) Renunciation before performance due.	
	Windmuller v. Pope, 107 N. Y. 674	555
	Dingley v. Oler, 117 U. S. 490	556
	(ii.) Impossibility created by one party before performance due.	
	Wolf v. Marsh, 54 Cal. 228	
	Delamater v. Miller, 1 Cow. 75	561

(iii.) By lapse of time.

CHAPTER IV.

. Impossibility of Performance.

SECT	ION	PAGE
1.		
	Anderson v. May, 50 Minn. 280	639
	Dermott v. Jones, 2 Wall. 1	641
2.	Exceptions.	
	(i.) Legal impossibility.	
	Cordes v. Miller, 39 Mich. 581	645
	Hughes v. Wamsutta Mills, 11 Allen, 201,	647
	(ii.) Destruction of subject-matter.	
	Dexter v. Norton, 47 N. Y. 62	649
	Wilmington Transp. Co. v. O'Neil, 98 Cal. 1	654
	(iii.) Death or disability of party in contract for personal service.	001
	Spalding v. Rosa, 71 N. Y. 40	655
	Spanding v. Rosa, 11 N. 1. 40	000
•		
	CHAPTER V.	
	DISCHARGE BY OPERATION OF LAW.	
_		
1.	Merger.	
	Clifton v. Jackson Iron Co., 74 Mich. 183	659
2.	Alteration or loss of written instrument.	
	Smith v. Mace, 44 N. H. 553	660
	Clough v. Seay, 49 Iowa, 111	665
	McRaven v. Crisler, 53 Miss. 542	577
	Blade v. Noland, 12 Wend. 173	666
3.	Bankruptcy.	
	Reed v. Pierce, 36 Me. 455	669
	CHAPTER VI.	
	IMPAIRMENT OF OBLIGATION OF CONTRACT BY STATUTE.	
1.	Statutes discharging obligation of contracts.	
1.	(i.) Discharge under bankruptcy statutes.	
	a. As to antecedent debts.	
		074
	Sturges v. Crowninshield, 4 Wheat. 122	674
	Roosevelt v. Cebra, 17 Johns. 108	683
	b. As to foreign creditors.	000
	Gilman v. Lockwood, 4 Wall. 409	683
	Guernsey v. Wood, 130 Mass. 503	685
	(ii.) Discharge under statutes imposing new conditions.	
	Robinson v. Magee, 9 Cal. 81	686
	Cook v. Googins, 126 Mass. 410	690

	TABLE OF CONTENTS.	XV11
	4	
SECT	TION	PAGE
2.	Statutes impairing the remedy on contracts.	
	Walker v. Whitehead, 16 Wall. 314	690
	Fisk v. Jefferson Police Jury, 116 U. S. 131	693
3.	Impairment of contracts of record.	
	O'Brien v. Young, 95 N. Y. 428	696, 76
4.	Contracts with the State.	
	Fletcher v. Peck, 6 Cranch, 87	696
	Lord v. Thomas, 64 N. Y. 107	700
	·	
	Alexander for the state of the	
_		# 0.6
100	dox	709

•

TABLE OF CASES REPORTED.

----o;6<----

Ackert v. Barker, 131 Mass. 436				354
Adams v. Messinger, 147 Mass. 185	•	•	• •	613
Adams Radiator &c. Works v. Schnader, 155 Pa.				549
Alden v. Thurber, 149 Mass. 271				630
Allen v. Brown, 44 N. Y. 228				459
Allen v. Collier, 70 Mo. 138				637
Aller v. Aller, 40 N. J. Law, 446				82
Anderson v. May, 50 Minn. 280				639
Arkansas &c. Co. v. Belden &c. Co., 127 U. S. 379				438
,				
Bangor Bank v. Treat, 6 Greenl. (Vt.) 207				494
Barrett v. Buxton, 2 Aikens (Vt.), 167				228
Bartholomew v. Jackson, 20 Johns. (N. Y.) 28.				14
Bassett v. Hughes, 53 Wis. 319				428
Beebe v. Johnson, 19 Wend. (N. Y.) 500				152
Bellows v. Sowles, 57 Vt. 164				110
Bender v. Been, 78 Iowa, 283				87
Bernard v. Taylor, 23 Ore. 416				407
Bird v. Munroe, 66 Me. 337				92
Bishop v. Palmer, 146 Mass. 469			372,	380
Bixby v. Moor, 51 N. H. 402				378
Blade v. Noland, 12 Wend. (N. Y.) 173				666
Boggs v. Curtin, 10 S. & R. (Penn.) 211				497
Boigneres v. Boulon, 54 Cal. 146				357
Borden v. Boardman, 157 Mass. 410				435
Boston Ice Co. v. Potter, 123 Mass. 28				243
Bragg v. Wetzell, 5 Blackf. (Ind.) 95				486
Brown v. Kinsey, 81 N. C. 245				395
Brusie v. Peck Bros., 14 U. S. App. 21				582
Bryant v. Isburgh, 13 Gray (Mass.), 607				609
xix				

			PAGE
Carter v. United States Ins. Co., 1 Johns. Ch. (N	. Y.)	463	. 452
Chatham Furnace Co. v. Moffatt, 147 Mass. 403.			
Clark v. Marsiglia, 1 Den. (N. Y.) 317			. 572
Clason v. Bailey, 14 Johns. (N. Y.) 484			. 102
Clifton v. Jackson Iron Co., 74 Mich. 183			. 659
Clough v. Seay, 49 Iowa, 111			. 665
Colby v. Dearborn, 59 N. H. 326			. 501
Coleman v. Applegarth, 68 Md. 21			. 57
Collyer v. Moulton, 9 R. I. 90	٠		. 522
Compton v. Jones, 4 Cow. (N. Y.) 13			. 444
Cook v. Bradley, 7 Conn. 57			. 133
Cook v. Googins, 126 Mass. 410			. 690
Cooper v. Lansing Wheel Co., 94 Mich. 272			. 50
Coplay Iron Co. v. Pope, 108 N. Y. 232			. 597
Cordes v. Miller, 39 Mich. 581			. 645
Cort v. Lassard, 18 Ore. 221			. 619
Coyner v. Lynde, 10 Ind. 282			. 177
Cross v. Cross, 58 N. H. 373			. 361
Crumlish's Adm'r v. Cent. Imp. Co., 38 W. Va. 39	90 .		. 412
Cummings v. People, 50 Ill. 132			. 492
•			
Davison v. Von Lingen, 113 U. S. 40		59	94, 265
Dawe v. Morris, 149 Mass. 188			
Dawkins v. Sappington, 26 Ind. 199			14, 65
Dearborn v. Bowman, 3 Metcalf (Mass.), 155.			
Delamater v. Miller, 1 Cow. (N. Y.) 75			. 561
Derby v. Johnson, 21 Vt. 17			. 568
Dermott v. Jones, 2 Wall. (U. S.) 1		5.	55, 641
Devecmon v. Shaw and Devries, Ex'rs, 69 Md. 19	9.		. 141
Dexter v. Norton, 47 N. Y. 62			. 649
Diamond Match Co. v. Roeber, 106 N. Y. 473 .			. 362
Dickinson v. Calahau's Adm'rs, 19 Pa. St. 227.			
Dingley v. Oler, 117 U. S. 490			
Duplex Safety Boiler Co. v. Garden, 101 N. Y. 38	37 .		. 546
Dusenbury, Executor, v. Hoyt, 53 N. Y. 521.			
Duval v. Wellman, 124 N. Y. 156			
Eliasou et al. v. Henshaw, 4 Wheat. (U. S.) 225			. 38
Endriss v. Belle Isle Ice Co., 49 Mich. 279			
Erie Ry. Co. v. Union &c. Co., 35 N. J. L. 240.			

TABLE OF CASES REPORTED.				xxi
				PAGE
Field v. Mayor, 2 Seld. (N. Y.) 179				453
				150
Fish v. Cleland, 33 Ill. 237				288
Fisher v. Deering, 60 Ill. 114				470
Fisher v. Seltzer, 23 Pa. St. 308				49
Fisk v. Jefferson Police Jury, 116 U.S. 131				693
Fitch v. Snedaker, 38 N. Y. 248			14	. 62
Fletcher v. Peck, 6 Cranch (U. S.), 87				696
Fogg v. Portsmouth Athenæum, 44 N. H. 115				10
				15
Ford v. Mitchell, 15 Wis. 304			·	
Foster v. Metts & Co., 55 Miss. 77				164
Freyman v. Knecht, 78 Pa. St. 141				607
rioginal v. ixilootto, to ra. Su. 141	•	•	•	001
Ganson v. Madigan, 15 Wis. 144				504
Gibson v. Pelkie, 37 Mich. 380				247
				544
Gilman v. Lockwood, 4 Wall. (U. S.) 409				683
Gleason v. Dyke, 22 Pick. (Mass.) 390				
Goddard v. Binney, 115 Mass. 450				127
Gordon v. George, 12 Ind. 408				
Gorham's Adm'r v. Meacham's Adm'r, 63 Vt. 231				
Graves v. Johnson, 156 Mass. 211				
Greenwood v. Law, 55 N. J. Law, 168				131
Gribben v. Maxwell, 34 Kans. 8				
Grigsby v. Stapleton, 94 Mo. 423				
				685
Guernscy V. Wood, 150 Hauss. 505	•		•	000
Hale v. Spaulding, 145 Mass. 482				487
Hale v. Trout, 35 Cal. 229				561
Hall v. Perkins, 3 Wend. (N. Y.) 626				311
Hamer v. Sidway, 124 N. Y. 538				
Hamilton v. Home Ins. Co., 137 U. S. 370				
Hamilton v. Liverpool &c. Ins. Co., 136 U. S. 242				
Handy v. St. Paul Globe Pub. Co., 41 Minn. 188				
Harvey v. Merrill, 150 Mass. 1				
Hayes v. Willio, 4 Daly (N. Y. C. P.), 259				451
				442
Hecht v. Batcheller, 147 Mass. 335				255
				457
Hertzog v. Hertzog, 29 Pa. St. 465				1
nertzog v. nertzog, 29 fa. St. 400	•	•		Т

			PAGE
Heyn v. Philips, 37 Cal. 529	٠	٠	118
Hicks v. Burhans, 10 Johns. (N. Y.) 242	•	•	205
Hill v. Grigsby, 35 Cal. 656		٠	580
Hirth v. Graham, 50 Ohio St. 57		•	124
Hobbs v. Massasoit Whip Co., 158 Mass. 194			24
Hough v. Barton, 20 Vt. 455			445
Howarth v. Warmser, 58 Ill. 48			479
Hughes v. Wamsutta Mills, 11 Allen (Mass.), 201.			647
Hunnewell v. Duxbury, 154 Mass. 286			303
Jaffray v. Davis, 124 N. Y. 164			187
Jeffries v. Ferguson, Adm'r, 87 Mo. 244			489
Jessel v. Williamsburgh Ins. Co., 3 Hill (N. Y.), 88.			444
Johnson's Adm'r v. Sellers' Adm'r, 33 Ala. 265			185
Jones v. Stanly, 76 N. C. 355			418
Keller v. Holderman, 11 Mich. 248			71
Kidder v. Kidder, 33 Pa. St. 268		i	625
Knight v. Abbott, 30 Vt. 577	·	Ī	541
Kromer v. Heim, 75 N. Y. 574	•	•	627
Kurtz v. Frank, 76 Ind. 594		•	358
Kyle v. Kavanagh, 103 Mass. 356			246
Laidlaw v. Organ, 2 Wheat. (U.S.) 178			282
Lawrence v. Fox, 20 N. Y. 268		•	422
		•	
	٠	•	420
·	. En		306
Lingenfelder et al. v. Wainwright Brewing Co., 103 Mc		0	181
Lord v. Thomas, 64 N. Y. 107		•	700
Love v. Harvey, 114 Mass. 80	•	•	324
McClurg v. Terry, 21 N. J. Eq. 225			72
McCreery v. Day, 119 N. Y. 1			524
McKinney v. Alvis, 14 Ill. 33			443
McKown v. Furgason, 47 Ia. 636			301
Maclay v. Harvey, 90 Ill. 525		•	41
McMillan v. Ames, 33 Minn. 257			54
McRaven v. Crisler, 53 Miss. 542			
Malone v. Boston & Worcester R. R. 12 Gray (Mass.), 3	388 388		19
Manchester v. Braedner, 107 N. Y. 346		•	635
Materne v. Horwitz, 101 N. Y. 469	•	•	338
Mather a Butler Co. 28 Ia 253		•	619

TABLE OF CASES REPORTED.	xxiii
May v. Hanson, 6 Cal. 642	PAGI
May a Williams 61 Miss 195	. 496
May v. Williams, 61 Miss. 125	. 113
Merrill v. Packer, 80 Iowa, 542	339 n.
Middlefield v. Church Mills Knitting Co., 160 Mass. 267.	. 476
Miller v. Covert, 1 Wend. (N. Y.) 487	. 631
Mills v. Wyman, 3 Pick. (Mass.) 207	
Minneapolis and St. Louis Ry. v. Columbus Rolling Mil	
119 U. S. 149	. 74
Minnesota Oil Co. v. Collier &c. Co., 4 Dillon (U. S. C. C.)),
431	. 46
Mohr v. Miesen, 47 Minn. 228	. 325
Moore v. Phœnix Ins. Co., 62 N. H. 240	. 531
Morse v. Woodworth, 155 Mass. 233	. 308
Moulton v. Kershaw, 59 Wis. 316	. 67
New v. Walker, 108 Ind. 365	. 399
Nolan v. Whitney, 88 N. Y. 648	. 542
Norrington v. Wright, 115 U. S. 188	. 584
Northern et al v. The State on the Relation of Lathrop,	1
Ind. 113	, 123
Northrup v. Northrup, 6 Cow. (N. Y.) 296	
O'Brien v. Young, 95 N. Y. 428	696 76
O'Donnell v. Leeman, 43 Me. 158	
O Donnell v. Deeman, 40 Me. 100	02, 100
Pangborn v. Westlake, 36 Ia. 546	. 315
Partridge v. Hood, 120 Mass. 403	
Pennsylvania Coal Co. v. Blake, 85 N. Y. 226	
Perkins v. Lockwood, 100 Mass. 249	. 197
Peters v. Westborough, 19 Pick. (Mass.) 364	. 120
Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183	
Platner v. Patchin, 19 Wis. 333	
Pope v. Allis, 115 U. S. 363	
Pratt v. Trustees, 93 Ill. 475	. 35
Ray v. Thompson, 12 Cush. (Mass.) 281	. 534
Reed v. Insurance Co., 95 U.S. 23	. 511
Reed v. Pierce, 36 Me. 455	. 669
Reynolds v . Robinson, 110 N. Y. 654	. 502
Reynolds v. Stevenson, 4 Ind. 619	
	. 686
Robinson v. Magee, 9 Cal. 81	. 000

		PAGI
Rochester Lantern Co. v. Stiles &c. Co., 135 N. Y. 209.		
Roosevelt v. Cebra, 17 Johns. (N. Y.) 108		
Ross v. Drinkard's Adm'r, 35 Ala. 434		
Rovegno v. Defferari, 40 Cal. 459		261
Royal Ins. Co. v. Beatty, 119 Pa. St. 6		21
Russell v. Cook, 3 Hill (N. Y.), 504		165
Santa Clara &c. Co. v. Hayes, 76 Cal. 387	372	. 376
Schnell v. Nell, 17 Ind. 29		
School Directors v. Boomhour, 83 Ill. 17		271
Shaber v. St. Paul Water Co., 30 Minn. 179		
Shaw-v. Railroad Co., 101 U. S. 557		
Sheldon v. Davidson, 85 Wis. 138		
Shelton v. Ellis, 70 Ga. 297		
Shepard v. Rhodes, 7 R. I. 470		210
Sherman v. Kitsmiller, Adm'r, 17 S & R. (Penn) 45	73	
Sherwood v. Walker, 66 Mich. 568	,	249
Slater Woollen Co. v. Lamb, 143 Mass. 420	•	222
Smith v. Mace, 44 N. H. 553	• •	660
Smith v. Whildin, 10 Penn. St. 39		176
O II I TO I MADE TO ARRE		347
O 12 TT 11 40 3 E MOO		508
Spalding v. Rosa, 71 N. Y. 40		655
Stensgaard v. Smith, 43 Minn. 11		26
Sterling v. Sinnickson, 2 South. (N. J.) 756		359
Stevens v. Coon, 1 Pinney (Wis.), 356		155
Stevens v. Ludlum, 46 Minn. 160	303	
Story v. Lovett, 1 E. D. Smith (N. Y. C. P.), 153	000,	500
Streeper v. Williams, 48 Pa. St. 450	613	517
Sturges v. Crowninshield, 4 Wheat. (U. S.) 122		674
Sweigart v. Berk, 8 S. & R. (Penn.) 308		490
overgate of Both, o of a 20 (1 out.) ooo	•	490
Tayloe v . Ins. Co., 9 Howard (U. S.), 390		29
		167
Thurston v. Arnold, 43 Iowa, 43	504,	515
Tolhurst v. Powers, 133 N. Y. 460		174
Tracy v. Albany Exch. Co., 7 N. Y. 472		579
Trainer v. Trumbull, 141 Mass. 527		220
Trist v. Child, 21 Wall. (U. S.) 441		340
Trueblood v. Trueblood, 8 Ind. 195		218
Tyler v. Carlisle, 79 Me. 210		390

. . . 503, 430

Wood v. Moriarty, 15 R. I. 518

TABLE OF CASES CITED.

NOTE. — This table includes only the cases cited by the editors in the notes. Cases digested, or to which particular attention is called, are indicated by a "d" after the page number.

A.

Adams v. Gay, 323. Adams Radiator &c. Co. v. Schnader, 485. Albany City Sav. Inst. v. Burdick, 307. Alden v. Thurber, 524. Alexander v. Morgan, 479 d. Allen v. Baker, 485. Allen v. Bryson, 205 d. Allen v. Gardiner, 323. Allen v. Hammond, 248. Allison v. Chandler, 611. Alpaugh v. Wood, 487 d. Anderson v. Rice, 572. Anderson v. Spence, 118. Andrews v. Dyer, 507. Auditor v. Ballard, 67.

В,

Bacon v. Bonham, 456. Bagley v. Cleveland Rolling Mill Co., 603. Baldwin v. Hale, 682. Ballou v. Earle, 19. Barfield v. Price, 247. Beach v. First M. E. Ch., 38. Beck &c. Co. v. Colorado &c. Co., 517-18 d. Bedell v. Herring, 243. Bedell v. Wilder, 248. Beecher v. Conradt, 582. Beeman v. Banta, 612. Bellows v. Sowles, 167. Beninger v. Corwin, 288. Bernard v. Taylor, 325, 658. Bigelow v. Stilphens, 666. Billings' Appeal, 485.

Bixby v. Dunlap, 418. Blewitt v. Boorum, 503. Bloch v. Isham, 476. Bloom v. Richards, 323. Blossom v. Dodd, 20. Boothby v. Scales, 611. Boston & Maine R. v. Bartlett, 62. Bourlier Bros. v. Macauley, 418 d. Bowery Nat. Bk. v. Wilson, 347, 452. Bowman v. Phillips, 351. Boyle v. Adams, 347. Boyson v. Thorn, 419 d. Bradley v. Levy, 572. Bradshaw v. Combs, 503. Brigg v. Hilton, 609. Britton v. Turner, 658. Bronson v. Kinzie, 690, 692. Brooks v. Cooper, 347. Brown v. Everhard, 503. Brown v. Farmers' Loan & Trust Co., 100 d. Brown v. Montgomery, 288 d. Brown v. Tuttle, 357. Brownlee v. Lowe, 187. Brunswick Gas Light Co. v. United Gas &c. Co., 224 d. Bryan v. Watson, 323 d. Burns v. Lane, 292. Burton v. Larkin, 421. Butler v. Butler, 574.

Binghamton Bridge, The, 699 d.

C.

Cahen v. Platt, 594.
Canada So. Ry. v. Gebhard, 674.
Canal Co. v. Ray, 530.
Candee v. Smith, 489.
Cape Fear &c. Nav. Co. v. Wilcox, 561.

xxvii

Capen v. Barrows, 497 d. Carter v. Nichols, 457. Cary v. Gruman, 609. Catskill Bk. v. Messenger, 488. Central Trans. Co. v. Pullman's Car Co., 223 d. Chaffee v. Jones, 489. Chalfant v. Payton, 360-1 d. Chamberlain v. Ins. Co., 437, 445. Chambers v. Baldwin, 419 d. Chapin v. Dobson, 503. Chapman v. Rose, 243. Chase v. Fitz, 485. Chatham Furnace Co. v. Moffat, 271. Chipley v. Atkinson, 418 d. Chipman v. Morrill, 489. Christian College v. Hendley, 199. Clapp v. Pawtucket Inst. for Sav., 497 d. Clark v. Allen, 337. Clark v. Marsiglia, 613. Clark v. Mayor, 572 d. Clark v. Owens, 501. Cleary v. Sohier, 653. Clodfelter v. Cox, 459. Clough v. Baker, 576. Clough v. Goggins, 323. Coates v. Penn. Ins. Co., 421. Cole v. Hughes, 476. Collyer v. Moulton, 626. Connor v. Stanley, 314 d. Cooke v. Nathan, 292. Costello v. Ten Eyck, 323. Cotheal v. Talmage, 521. Cottage St. Ch. v. Kendall, 38, 199. Coulter v. Robertson, 401. Cowley v. Smyth, 301. Crane v. Alling, 488. Crane v. Powell, 100. Cranson v. Goss, 323. Crawford v. Chapman, 472. Crocker v. Beal, 492. Crocker v. Whitney, 444. Cromwell v. Tate's Ex'r, 86. Crouch v. Gutmann, 543. Croyle v. Moses, 284 d.

D.

Da Lee v. Blackburn, 301. Danforth v. Tennessee &c. R'y Co., 568.

Dartmouth College v. Woodward, 699 d. Davenport v. First Cong. Society, 187. Davis v. Bronson, 574 d. Davis v. Nuzum, 301. Davis v. Wells, 29. Davison v. Von Lingen, 515, 611. Day v. McAllister, 323. Day v. Pool, 609. Dazev v. Mills, 446. Dean v. Emerson, 376. Dean v. Morey, 284. Dean v. St. Paul & D. R. Co., 457. Dean v. Walker, 421. Deaver v. Bennett, 389. De Camp v. Hamma, 243, Delaware Railroad Tax, 699. Denny v. Bennett, 685. Denver Fire Ins. Co. v. McClelland, 224. Devlin v. Mayor, 449 d. Diamond Match Co. v. Roeber, 521. Dickinson v. Calahan's Adm'r, 658. Dickson v. Dickson, 418. Dillon v. Anderson, 574. Dodge v. McClintock, 576. Doggett v. Emerson, 271. Donnell v. Manson, 492. Doolittle v. McCullough, 572 d, 575 d. Doty v. Wilson, 208. Douglass v. Howland, 29. Drummond v. Crane, 485. Duffany v. Ferguson, 291. Dulaney v. Rogers, 301. Duncan v. N. Y. Mut. Ins. Co., 248. Durant v. Rhener, 323. Durbin v. Kuney, 489. Duval v. Wellman, 658.

E.

Easterly v. Barber, 490 d.
Eaton v. Avery, 306.
Eberle v. Mehrback, 323.
Eckstein v. Downing, 619.
Eddy v. Davis, 582.
Edwards v. Kearzey, 692 d.
Edwards v. Peterson, 456.
Edwards v. Skirving, 398.
Eggleston v. Buck, 496.
Ehle v. Purdy, 492.
Eldred v. Bank, 489.

Elliott v. Bell, 487.
Elliott v. Caldwell, 545-6 d.
Ely v. Hallett, 274.
Emmeluth v. Home &c. Association, 497 d.
Etting v. Bank of U. S., 284.
Exchange Bk. v. McLoon, 457.
Exhaust Vent. Co. v. Chicago &c. Ry., 554.

F.

Farni v. Tesson, 492.
Faulkner v. Faulkner, 437 d.
Fay & Co. v. Jenks & Co., 494 d.
Fay v. Guynon, 446.
Fetrow v. Wiseman, 219-20 d.
Finn v. Donahue, 323.
First N. B. v. Yocum, 301.
First Pres. Ch. v. Cooper, 199.
Fish v. Cleland, 314.
Fitch v. Snedaker, 75.
Foley v. Speir, 380.
Ford v. Mitchell, 467.
Foster v. Hooper, 489.
Fowler v. Callan, 357.
Franklin v. Long, 611.

G.

Gamewell Fire Alarm Tel. Co. v. Crane, 372. Gelpcke v. Dubuque, 376, 674. Gibbs v. Consolidated Gas Co., 372 d. Gibbs v. Linabury, 243. Gibson v. Cooke, 457. Giles v. Canary, 495 d. Given v. Driggs, 398. Given v. Wright, 699. Gleason v. Dyke, 415. Glenn v. Farmers' Bank, 401. Goddard v. Monitor Ins. Co., 274. Goldsborough v. Gable, 185. Goodrich v. Tenney, 351. Goss v. Ellison, 488. Gottschalk v. Stein, 619. Gould v. Brown, 576. Grandin v. Grandin, 167 d. Gray v. Hamil, 205. Green v. Batson, 504. Green v. Gilbert, 658.

Greenawalt v. Kohne, 504. Greenfield v. Gilman, 372 d. Gregory v. Schoenell, 273 d. Griffin v. Colver, 611.

Н.

Hacker's Appeal, 86. Hale v. Spaulding, 503, 626. Hale v. Trout, 611. Halloran v. Whitcomb. 446. Halsted v. Francis, 437. Hamer v. Sidway, 6, 100. Hamilton v. Home Ins. Co., 353 d. Hammond v. Pennock, 271. Handy v. St. Paul Globe Co., 380. Hardy v. Waters, 219 d. Harms v. McCormick, 429. Harner v. Dipple, 220. Hart v. Lyon, 476. Hartford Ins. Co. v. Olcott. 445. Haskins v. Royster, 418. Hastings v. Dollarhide, 219 d. Hastings v. Ins. Co., 445. Haven v. Neal, 301. Hawkins v. Graham, 548 d. Hayward v. Leonard, 543. Hazard v. New. Eng. Marine Ins. Co., 247 d. Heaton v. Angier, 530. Heckemann v. Young, 489. Hellams v. Abercrombie, 323. Hendrick v. Lindsay, 421 d. Higert v. Indiana Asbury Univ., 199. Hill v. Morse, 490 d. Hix v. Davis, 495. Hoeflinger v. Wells, 541 d. Holcomb v. Noble, 301. Homer v. Ins. Co., 503. Hosmer v. Wilson, 572 d. Houghwout v. Boisaubin, 62. Howard v. Daly, 613. Howard v. Mfg. Co., 612. Howland v. Lounds, 65. Hubble v. Cole, 510. Hudson v. Hudson, 572 d. Hughes v. Oregon Ry. & Nav. Co., 429. Hull v. Ruggles, 318, 391. Hunt v. Danforth, 469.

Hunt v. Jones, 100.

I.

Indiana &c. Ry. v. Adamson, 492.

J.

Jackson v. Port, 469.
Jacobs v. Davis, 497.
James v. Newton, 457.
Jamieson v. Indiana Nat. Gas Co., 647.
Janin v. Browne, 485.
Jefferson v. Asch, 428, 429.
Johnson v. Brooks, 618-19.
Johnson v. Harvey, 490 d.
Juilliard v. Greenman, 674.

K.

Kadish v. Young, 574.
Kane v. Clough, 456.
Kane v. Hood, 582.
Katz v. Bedford, 543.
Kellogg v. Tompson, 503.
Kelly v. Bradford, 543.
Kendall v. Robertson, 401.
Kershaw v. Kelsey, 217.
Kidder v. Kidder, 488.
Kimball, The, 541.
King v. Eagle Mills, 301.
Kitchin v. Loudenback, 156.
Kurtz v. Frank, 556.
Kyte v. Com. Un. Ins. Co., 534 d.

L.

Lacy v. Getman, 485, 658. Laidlaw v. Organ, 264. Lansing v. Dodd, 521. Lapish v. Wells, 284 d. La Rue v. Groezinger, 448-9 d. Lathrop v. Knapp, 199. Lawrence v. Miller, 658. Legal Tender Cases, 674. Lennox v. Eldred, 479. Lewis v. Browning, 35. Lewis v. McLemore, 271. Lindsay v. Smith, 376, 378. Linneman v. Moross, 437. Long v. Warren, 307. Loper v. Robinson, 301. Loud v. Pomona &c. Co., 576, 582. Louisiana v. Mayor, 81. Ludlow v. McCrea, 497. Lynch v. Mercantile Trust Co., 301. Lynch v. Sellers, 575. Lyon v. Mitchell, 347.

M.

McAllester v. Sprague, 488-9 d. McCandless v. Alleghany Bessemer Steel Co., 177 d. McCauley v. Davidson, 174. McClair v. Austin, 572. McCracken v. Hayward, 692 d. McCreery v. Day, 631. McCulloch v. Eagle Ins. Co., 35. McDowell v. Laev, 429 d. McIntyre v. Buell, 301. McKenzie v. Harrison, 530 d. Maclay v. Harvey, 75. McMillan v. Ames, 86. Mactier v. Frith, 35. Madden v. Gilmer, 479. Madison Sq. Bk. v. Pierce, 415 d. Mandeville v. Welch, 457. Manhattan Life Ins. Co. v. Buck, 658. Manning v. Sprague, 356 d. Marquis v. Laureston, 575. Marsh v. Low, 609. Marston v. Knight, 611. Mason v. Eldred, 489. Matteson v. Holt, 609. Matthews v. Associated Press, 371-2 d. Maynard v. Maynard, 288 d, 613. Meguire v. Corwine, 347. Melbonrne &c. R. Co. v. Louisville &c. R. Co., 174. Merrill v. Packer, 156, 339 d. Merritt v. Earle, 323 d. Miller v. Ammon, 318. Miller v. The State, 699 d. Millerd v. Thorn, 435 d. Minneapolis &c. Ry. v. Columbus Rolling Mill, 41. Moline Scale Co. v. Beed, 574. Moore v. Detroit Loc. Works, 180. Moore v. Ins. Co., 515. Moore v. Murdock, 323. Moreland v. Atchison, 292. Morley v. Lake Shore Ry., 696. Morrill v. Wallace, 268. Mott v. Oppenheimer, 476 d.

Moulton v. Kershaw, 54.

Muller v. Eno, 609.

Mulvey v. King, 301.

Murray v. Mumford, 492.

Mustard v. Wohlford's Heirs, 220.

Mutual &c. Ass'n v. Hurst, 205 d.

Myrick v. Dame, 492.

N.

Nash v. Minn. &c. Co., 306. National Bank v. Union Ins. Co., 280 d. National Furnace Co. v. Keystone Mfg. Co., 54. Naumberg v. Young, 503. Nebraska, City of, v. Nebraska &c. Coke Co., 574. New v. Walker, 467. New Jersey v. Wilson, 699 d. New Orleans Gas Co. v. Louisiana Light Co., 699 d. New York &c. Co. v. Memphis Water Co., 452-3 d. Niblo v. Binsse, 653. Nichols v. S. S. Co., 568. Norrington v. Wright, 268, 515, 546. Norton v. Coons, 489.

0.

O'Brien v. Young, 6.
Odell v. Gray, 467 d.
O'Donnell v. Leeman, 518.
Ogden v. Saunders, 682.
Old Dominion S. S. Co. v. McKenna, 417 d.
Oliver v. Gilmore, 377.
Oregon Steam Nav. Co. v. Winsor, 376.
Osborne v. O'Reilly, 180.
Oscanyan v. Arms Co., 347.
Owen v. Hall, 666.

Ρ.

Paddock v. Strobridge, 284. Parker v. Macomber, 658. Parsons v. Sutton, 613. Patrick v. Bowman, 35. Patterson v. Caldwell, 456. Peltz v. Eichele, 376. Penniman's Case, 692 d.
People v. Keyser, 492.
Perry v. Mount Hope Iron Co., 35.
Phillips v. Gallant, 243.
Pierson v. Hooker, 492.
Pipp v. Reynolds, 437.
Pope v. Porter, 594.
Porter v. Dunn, 572.
Powers v. Bumcratz, 29.
Providence Bk. v. Billings, 699.

R.

Reece v. Kyle, 357.

Rice v. Manley, 419 d. Rich v. N. Y. C. & H. R. R. R. Co., 6. Richards v. Amer. Desk &c. Co., 372. Richmond v. Moore, 323. Riegel v. Amer. Life Ins. Co., 248. Robinson v. Harbour, 582. Robinson v. Jewett, 187. Roebling &c. Co. v. Lock Stitch &c. Co., 574. Rogers v. Gosnell, 421. Rogers v. Hanson, 611. Rogers v. Rogers, 181. Rothholz v. Schwartz, 619. Rowland v. N. Y. &c. R. Co., 262. Rowley v. Stoddard, 488. Runkle v. Johnson, 582. Rupley v. Daggett, 262. Russell v. Stewart, 67.

S.

Salisbury v. Howe, 302. Salisbury v. Shirley, 469. Sanborn v. Cole, 501 d. Santa Clara &c. Co. v. Hayes, 372. Savings Bk. v. Shaffer, 666. Sayre v. Wilson, 504. Sceva v. True, 6. Schnell v. Nell, 151, 167. School Directors v. Boomhour, 301. Schuler v. Myton, 187. Schumaker v. Mather, 307. Scott v. McMillan, 476. Searles v. Reed, 323. Seattle Bd. of Trade v. Hayden, 237. Sessions v. Johnson, 495 d. Seymour v. Western R. Co., 497. Shaffner v. Pinchback, 389.

Shamp v. Meyer, 421. Shaw v. Carpenter, 380. Sheldon v. Davidson, 307. Sherley v. Peehl, 62. Sherman v. Kitsmiller, 611. Shoemaker v. Benedict, 489. Siler v. Grav. 485. Silsby Mfg. Co. v. Chico, 554. Sims v. Ferrill, 291 d. Singleton v. Bremar, 398, 401. Slater Woollen Co. v. Lamb, 6. Slaughter's Adm'r v. Gerson, 307 d. Smith's Appeal, 376. Smith v. Collins, 81. Smith v. Hale, 614. Smith v. Perine, 151. Solon v. Williamsburgh Sav. Bk., 86. Spurr v. Benedict, 271. Stamper v. Temple, 65. Stanton v. Embrey, 356-7 d. Stark v. Parker, 658. State v. Chandler, 494. Steele v. Lord, 669. Stewart v. Keteltas, 180. Stewart v. Stone, 653. Stewart v. Wyoming Ranche Co., 284 d. Stockbridge v. West Stockbridge. 501 d. Strauss v. Meertief, 613. Sun Mut. Ins. Co. v. Ocean Ins. Co., Swain v. Schieffelin, 612. Swan v. Scott, 398. Swann v. Swann, 323. Sweeney v. Thomason, 510.

T.

Tayloe v. Merchants' Fire Ins. Co., 541.

Taylor v. Bemiss, 357 d.

Taylor v. Leith, 271.

Terry v. Anderson, 692.

Thayer v. Daniels, 459.

Thomas v. Barnes, 180.

Thomas v. Rock Island &c. Mining Co., 457.

Thompson v. Rose, 469.

Thornton v. Wynn, 609.

Thurston v. Arnold, 619.

Tobias v. Rogers, 489-90 d.

Toledo &c. Ry. Co. v. Penn. Co., 417 d.
Tool Co. v. Norris, 347 d.
Traders' Bank v. Alsop, 401.
Trainer v. Trumbull, 6.
Trevor v. Wood, 35.
Trimble v. Strother, 421.
Trist v. Child, 457.
Troewert v. Decker, 323.
Trustees v. Stewart, 199.
Trustees of Dartmouth Coll. v. Woodward, 699.
Tucker v. White, 301.
Tufts v. Lawrence, 574.
Twenty-Third St. Bap. Ch. v. Cornell, 38.
Tyler v. Carlisle, 411.

U.

Union Bk. v. Coster's Ex'rs, 29.
Union Bk. v. Willis, 690.
Univ. of Des Moines v. Livingstone, 199.
Upton v. Tribilcock, 291.
United States v. Behan, 567-8 d, 612.
United States v. Bradley, 376.
United States v. Peck, 561.

v.

Van Brunt v. Day, 503.
Van Buskirk v. Hartford Ins. Co., 459 d.
Van Clief v. Van Vechten, 546 d.
Vassar v. Camp, 35 d.
Voorhees v. Earl, 609.
Vrooman v. Turner, 428 d.

w.

Wade v. Kalbfleisch, 485.
Wakeman v. Dalley, 301.
Wakeman v. Wheeler & Wilson Mfg.
Co., 611-12 d.
Walker v. Brooks, 453.
Walker v. Ebert, 467.
Walker v. Mauro, 460 d.
Walker v. Ocean Bk., 467 d.
Walls v. Bailey, 510.
Walter A. Wood & Co. v. Smith, 554 d.
Ward v. Morrison, 459.
Warnock v. Davis, 452.

Webb v. Steele, 446 d. Webber v. Barry, 418 d. Wells v. Alexandre, 54. Wells v. Monihan, 100 d. Wells, Fargo & Co. v. Pacific Ins. Co., 268. Westman v. Krumweide, 503. Wharton v. Winch, 568 d. Wheat v. Cross, 35. Whitaker v. Whitaker, 151. White v. Rintoul, 118. Wickham v. Grant, 273 d. Widiman v. Brown, 181. Wilkinson v. Heavenrich, 110. Williams v. Ingersoll, 458-9 d. Wilson v. Tucker, 502. Windmuller v. Pope, 611. Wolcott v. Mount, 268.

Wolfe v. Howes, 658.
Wood v. Orford, 479.
Wood Mowing &c. Co. v. Gaertner, 503.
Woods v. Woods, 690.
Woodstock Iron Co. v. Richmond &c. Co., 347.
Worley v. Sipe, 421.
Wortendyke v. Meehan, 401.
Worthington, Matter of, 452.

Y.

Yorks v. Peck, 489. Young v. Stevens, 227.

Z.

Zimmer v. N. Y. C. &c. R., 19.

CASES ON CONTRACT.

0020500

PART I. INTRODUCTION.

HERTZOG. v. HERTZOG.

29 PENNSYLVANIA STATE, 465. -1857.

This suit was brought by John Hertzog to recover from the estate of his father compensation for services rendered the latter in his lifetime, and for money lent.

Lowrie, J. "Express contracts are, where the terms of the agreement are openly uttered and avowed at the time of the making: as, to deliver an ox or ten loads of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate; and which, therefore, the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work, the law implies that I undertook and contracted to pay him as much as his labor deserves. If I take up wares of a tradesman without any agreement of price, the law concludes that I contracted to pay their real value."

This is the language of Blackstone (2 Comm. 443), and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

But it appears in another place (3 Comm. 159-166) that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in assumpsit.

It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty.

We have, therefore, in law three classes of relation called contracts.

- 1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.
- 2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.
 - 3. Express contracts, already sufficiently distinguished.

In the present case there is no pretense of a constructive contract, but only of a proper one, either express or implied. And it is scarcely insisted that the law would imply one in such a case as this; yet we may present the principle of the case the more clearly, by showing why it is not one of implied contract.

The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties. Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service, the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbors for their services in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and therefore, by common custom, compensation is mutually counted on in one case, and in the other not.

On the same principle the law presumes that the exclusive possession of land by a stranger to the title is adverse, unless there be some family or other relation that may account for it. And such a possession by one tenant in common is not presumed adverse to his co-tenants, because it is, prima facie, accounted for by the relation. And so of possession of land by a son of the owner. And in Mayow's Case (Latch, 68) where an heir was in a foreign land at the time of a descent cast upon him, and his younger brother entered, he was presumed to have entered for the benefit of the heir. And one who enters as a tenant of the owner is not presumed to hold adversely even after his term has expired. In all such cases, if there is a relation adequate to account for the possession, the law accounts for it by that relation, unless the contrary be proved. A party who relies upon a contract must prove its existence; and this he does not do by merely proving a set of circumstances that can be accounted for by another relation appearing to exist between the parties.

Mr. Justice Rogers is entitled to the gratitude of the public for having, in several cases, demonstrated the force of this principle in interpreting transactions between parents and children: 3 Penn. R. 365; 3 Rawle, 249; 5 W. & S. 357, 513; and he has been faithfully followed in many other cases: 8 Watts, 366; 8 Penn. State R. 213; 9 Id. 262; 12 Id. 175; 14 Id. 201; 19 Id. 251, 366; 25 Id. 308; 26 Id. 372, 383.

Every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not. If we find, as ascer-

tained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require this inference.

But if we find a son in the employment of his father, we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family association, and does not demand the inference of a contract. And besides this, the position of a son in a family is always esteemed better than that of a hired servant, and it is very rare for sons remaining in their father's family, even after they arrive at age, to become mere hired servants. If they do not go to work or business on their own account, it is generally because they perceive no sufficient inducement to sever the family bond, and very often because they lack the energy and independence necessary for such a course; and very seldom because their father desires to use them as hired servants. Customarily no charges are made for boarding and clothing and pocket-money on one side, or for work on the other; but all is placed to the account of filial and parental duty and relationship.

Judging from the somewhat discordant testimony in the present case, this son remained in the employment of his father until he was about forty years old; for we take no account of his temporary absence. While living with his father, in 1842, he got married, and brought his wife to live with him in the house of his parents. Afterwards his father placed him on another farm of the father, and very soon followed him there, and they all lived together until the father's death in 1849. The farm was the father's, and it was managed by him and in his name, and the son worked on it under him. No accounts were kept between them, and the presumption is that the son and his family obtained their entire living from the father while they were residing with him.

Does the law, under the circumstances, presume that the parties mutually intended to be bound, as by contract, for the service and compensation of the son and his wife? It is not pretended that it does. But it is insisted that there are other circumstances

besides these which, taken together, are evidence of an express contract for compensation in some form, and we are to examine this.

In this court it is insisted that the contract was that the farm should be worked for the joint benefit of the father and son, and that the profits were to be divided; but there is not a shadow of evidence of this. And moreover it is quite apparent that it was wages only that was claimed before the jury for the services of the son and his wife, and all the evidence and the charge point only in that direction. There was no kind of evidence of the annual products.

Have we then any evidence of an express contract of the father to pay his son for his work or that of his wife? We concede that, in a case of this kind, an express contract may be proved by indirect or circumstantial evidence. If the parties kept accounts between them, these might show it. Or it might be sufficient to show that money was periodically paid to the son as wages; or, if there be no creditors to object, that a settlement for wages was had, and a balance agreed upon. But there is nothing of the sort here.

The court told the jury that a contract of hiring might be inferred from the evidence of Stamm and Roderick. Yet these witnesses add nothing to the facts already recited, except that the father told them, shortly before his death, that he intended to pay his son for his work. This is no making of a contract or admission of one; but rather the contrary. It admits that the son deserved some reward from his father, but not that he had a contract for any.

And when the son asked Roderick to see the father about paying him for his work, he did not pretend that there was any contract, but only that he had often spoken to his father about getting pay, and had always been put off. All this makes it very apparent that it was a contract that was wanted, and not at all that one already existed; and the court was in error in saying it might be inferred, from such talk, that there was a contract of any kind between the parties.

The difficulty in trying causes of this kind often arises from juries supposing that, because they have the decision of the cause, therefore they may decide according to general principles of honesty and fairness, without reference to the law of the case. But this is a despotic power, and is lodged with no portion of this government.

Their verdict may, in fact, declare what is honest between the parties, and yet it may be a mere usurpation of power, and thus be an effort to correct one evil by a greater one. Citizens have a right to form connections on their own terms and to be judged accordingly. When parties claim by contract, the contract proved must be the rule by which their rights are to be decided. To judge them by any other rule is to interfere with the liberty of the citizen.

It is claimed that the son lent \$500 of his wife's money to his father. The evidence of the fact and of its date is somewhat indistinct. Perhaps it was when the farm was bought. If the money was lent by her or her husband, or both, before the law of 1848 relating to married women, we think he might sue for it without joining his wife.

Judgment reversed and a new trial awarded.

Note. — For cases on constructive, or quasi, contract, see Trainer v. Trumbull, 141 Mass. 527, post, p. 220; Slater Woollen Co. v. Lamb, 143 Mass. 420, post, p. 222, and note; Sceva v. True, 53 N. H. 627; O'Brien v. Young, 95 N. Y. 428, post, p. 76.

For a case discussing obligation arising from delict as distinguished from obligation arising from breach of contract, see Rich v. New York Cent. & Hud. Riv. R. R. Co., 87 N. Y. 382; S. C., Burdick's Cases on Torts, p. 1.

For a case discussing obligation springing from agreement and yet distinguishable from contract see the latter portion of *Hamer* v. *Sidway*, 124 N. Y. 538, post, p. 143.

PART II.

THE FORMATION OF THE CONTRACT.

CHAPTER I.

OFFER AND ACCEPTANCE.

§ 1. Every contract springs from the acceptance of an offer.

WHITE v. CORLIES.

46 NEW YORK, 467.—1871.

Appeal from judgment of the General Term of the first judicial district, affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract. The plaintiff was a builder. The defendants were merchants. In September, 1865, the defendants furnished the plaintiff with specifications for fitting up a suit of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work. On September twenty-eighth the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions. On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, which he assented to by signing the same and returning it to the defendants. On the day following, the defendants' book-keeper wrote the plaintiff the following note:

"NEW YORK, September 29th.

[&]quot;Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.

[&]quot;The writer will call again, probably between five and six this P.M. "W. H. R.,

[&]quot;For J. W. Corlies & Co., 32 Dey street."

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September twenty-ninth, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon. And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey street (meaning to give notice of assent) before commencing the work? In my opinion it was not. He had a right to act upon this note and commence the job, and that was a binding contract between the parties." To this defendants excepted.

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September thirtieth was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal, may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts, that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

All concur, but Allen, J., not voting.

Judgment reversed, and new trial ordered.

GORHAM'S ADM'R v. MEACHAM'S ADM'R.

63 VERMONT, 231. - 1891.

[Reported herein at p. 88.]

 \S 2. An offer or its acceptance or both may be made either by words or by conduct.

FOGG v. PORTSMOUTH ATHENÆUM.

44 NEW HAMPSHIRE, 115.—1862.

Assumpsit.

The case was submitted to the decision of the court upon the following agreed statement of facts:

The defendants are a corporation whose object is the support of a library and public reading-room, at which latter a large number of newspapers are taken. Some are subscribed and paid for by the defendants; others are placed there gratuitously by the publishers and others; and some are sent there apparently for advertising purposes merely, and of course gratuitously.

The Independent Democrat newspaper was furnished to the defendants, through the mail, by its then publishers, from Vol. 3, No. 1 (May 1, 1847). On the 29th day of November, 1848, a bill for the paper, from Vol. 3, No. 1 (May 1, 1847), to Vol. 5, No. 1 (May 1, 1849), two years, at \$1.50 per year, was presented to the defendants by one T. H. Miller, agent for the then publishers, for payment. The defendants objected that they had never subscribed for the paper, and were not bound to pay for it. They at first refused on that ground to pay for it, but finally paid the bill to said Miller, and took upon the back thereof a receipt in the following words and figures:

"Nov. 29, 1848.

"The within bill paid this day, and the paper is henceforth to be discontinued.

"T. H. MILLER, for HOOD & Co."

Hood & Co. were the publishers of the paper from May 1, 1847, until February 12, 1849, when that firm was dissolved, and the paper was afterward published by the present plaintiffs. The change of publishers was announced, editorially and otherwise, in the paper of February 15, 1849, and the names of the new publishers were conspicuously inserted in each subsequent number of the paper, but it did not appear that the change was actually known to Mr. Hatch, the secretary and treasurer of the

corporation, who settled the above-named bill, and who continued in the office till January, 1850.

The plaintiffs had no knowledge of the agreement of the agent of Hood & Co. to discontinue the paper, as set forth in the receipt of November 29, 1848, until notified thereof by the defendants, after they had furnished the paper to the defendants for a year or more; the books of Hood & Co., which came into their hands, only showing that the defendants had paid for the paper, in advance, to May 1, 1849.

After the payment of the bill and the giving of the receipt above recited, the paper continued to be regularly forwarded by its publishers, through the mail, to the defendants, from the date of said receipt until May 1, 1849, the expiration of the period named in said bill; and was in like manner forwarded from May 1, 1849, to January 1, 1860, or from Vol. 5, No. 1, to Vol. 15, No. 35, inclusive, the period claimed to be recovered for in this suit; and was during all that time constantly taken from the post-office by the parties employed by the defendants to take charge of their reading-room, build fires, etc., and placed in their reading-room. Payment was several times demanded during the latter period, of the defendants, by an agent or agents of the plaintiffs; but the defendants refused to pay, on the ground that they were not subscribers for the paper.

Conspicuously printed in each number of the paper sent to and received by the defendants were the following:

"Terms of Publication: By mail, express, or carrier, \$1.50 a year, in advance; \$2 if not paid within the year. No paper discontinued (except at the option of the publishers) unless all arrearages are paid."

The questions arising upon the foregoing case were reserved and assigned to the determination of the whole court.

NESMITH, J. There is no pretense upon the agreed statement of this case that the defendants can be charged upon the ground that they were subscribers for the plaintiffs' newspaper, or that they were liable in consequence of the existence of any express contract whatever. But the question now is, have the defendants so conducted as to make themselves liable to pay for the plaintiffs' newspaper for the six years prior to the date of the plaintiffs'

writ, under an implied contract raised by the law and made applicable to this case.

If the seller does in any case what is usual, or what the nature of the case makes convenient and proper, to pass the effectual control of the goods from himself to the buyer, this is always a delivery. In like manner, as to the question of acceptance, we must inquire into the intention of the buyer, as evinced by his declarations and acts, the nature of the goods, and the circumstances of the case. If the buyer intend to retain possession of the goods, and manifests this intention by a suitable act, it is an actual acceptance of them; or this intention may be manifested by a great variety of acts in accordance with the varying circumstances of each case. 2 Pars. on Con. 325.

Again, the law will imply an assumpsit, and the owner of goods has been permitted to recover in this form of action, where they have been actually applied, appropriated, and converted by the defendant to his own beneficial use. *Hitchin* v. *Campbell*, 2 W. Black, 827; *Johnson* v. *Spiller*, 1 Doug. 167; *Hill* v. *Davis*, 3 N. H. 384, and the cases there cited.

Where there has been such a specific appropriation of the property in question, the property passes, subject to the vendor's lien for the price. Rohde v. Thwaites, 6 B. & C. 392. In Baines v. Jevons (7 C. & P. 617) the question was, whether the defendant had purchased and accepted a fire engine. It was a question of fact for the jury to determine. Lord Abinger told the jury, if the defendant had treated the fire engine as his own, and dealt with it as such, if so, the plaintiff was entitled to recover for its price. And the jury so found. 2 Greenl. Ev. sec. 108.

In Weatherby v. Banham (5 C. & P. 228) the plaintiff was publisher of a periodical called the Racing Calendar. It appeared that he had for some years supplied a copy of that work, as fast as the numbers came out, to Mr. Westbrook; Westbrook died in the year 1820; the defendant, Bonham, succeeded to Westbrook's property, and went to live in his house, and there kept an inn. The plaintiff, not knowing of Westbrook's death, continued to send the numbers of the Calendar, as they were published, by the stage-coach, directed to Westbrook. The plaintiff proved by a

servant that they were received by the defendant, and no evidence was given that the defendant had ever offered to return them. The action was brought to recover the price of the Calendar for the years 1825 and 1826. Talford, for the defendant, objected that there never was any contract between the plaintiff and the present defendant, and that the plaintiff did not know him. But Lord Tenterden said: "If the defendant received the books and used them, I think the action is maintainable. Where the books come addressed to the deceased gentleman whose estate has come to the defendant, and he keeps the books, I think, therefore, he is clearly liable in this form of action, being for goods sold and delivered."

The preceding case is very similar, in many respects, to the case before us. Agreeably to the defendants' settlement with Hood & Co., their contract to take their newspaper expired on the first of May, 1849. It does not appear that the fact that the paper was then to stop was communicated to the present plaintiffs, who had previously become the proprietors and publishers of the newspaper establishment; having the defendants' name entered on their books, and having for some weeks before that time forwarded numbers of their newspaper, by mail, to the defendants, they, after the first day of May, continued so to do up to January 1, 1860. During this period of time the defendants were occasionally requested, by the plaintiffs' agent, to pay their bill. The answer was, by the defendants, we are not subscribers to your newspaper. But the evidence is, the defendants used, or kept the plaintiffs' books, or newspapers, and never offered to return a number, as they reasonably might have done, if they would have avoided the liability to pay for them. Nor did they ever decline to take the newspapers from the post-office.

If the defendants would have avoided the liability to pay the plaintiffs, they might reasonably have returned the paper to the plaintiffs, or given them notice that they declined to take the paper longer.

We are of the opinion that the defendants have the right to avail themselves of the statute of limitations. Therefore, the plaintiffs can recover no more of their account than is embraced in the six years prior to the date of their writ, and at the sum of \$2 per year, with interest, from date of writ, or the date of the earliest demand of the plaintiffs' claim upon the defendants.

- § 3. An offer is made when, and not until, it is communicated to the offeree.
 - (i.) Ignorance of offered promise.

FITCH v. SNEDAKER.

38 NEW YORK, 248. - 1868.

[Reported herein at p. 62.]

DAWKINS v. SAPPINGTON.

26 INDIANA, 199.—1866.

[Reported herein at p. 65.]

(ii.) Ignorance of offered act.

BARTHOLOMEW v. JACKSON.

20 JOHNSON (N. Y.), 28. - 1822.

In error, on certiorari to a justice's court. Jackson sued Bartholomew before a justice, for work and labor, etc. B. pleaded non assumpsit. It appeared in evidence, that Jackson owned a wheat stubble-field, in which B. had a stack of wheat, which he had promised to remove in due season for preparing the ground for a fall crop. The time for its removal having arrived, J. sent a message to B., which, in his absence, was delivered to his family, requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. The sons of B. answered, that they would remove the stack by 10 o'clock the next morning. J. waited until that hour, and then set fire to the stubble, in a remote part of the field. fire spreading rapidly, and threatening to burn the stack of wheat, and J., finding that B. and his sons neglected to remove the stack, set to work and removed it himself, so as to secure it for B.; and he claimed to recover damages for the work and

labor in its removal. The jury gave a verdict for the plaintiff for 50 cents, on which the justice gave judgment, with costs.

PLATT, J. I should be very glad to affirm this judgment; for though the plaintiff was not legally entitled to sue for damages, yet to bring a *certiorari* on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant, and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it, therefore, forms no ground of action. The judgment must be reversed.

Judgment reversed.

(iii.) Ignorance of offered terms.

FONSECA v. CUNARD STEAMSHIP COMPANY.

153 MASSACHUSETTS, 553.—1891.

Contract, with a count in tort, against the defendant, as owner of the steamship Samaria, for damage to the plaintiff's trunk and its contents.

When the plaintiff engaged his passage in London, he received a passage ticket from the defendant's agent there. This ticket consisted of a sheet of paper of large quarto size, the face and back of which were covered with written and printed matter. Near the top of the face of the ticket, after the name of the defendant corporation and its list of offices in Great Britain, appeared in bold type the following: "Passengers' Contract Ticket." Upon the side margins were various printed notices to passengers, including the following:

"All passengers are requested to take notice that the owners of the ship do not hold themselves responsible for detention or delay arising from accident, extraordinary or unavoidable circumstances, nor for loss, detention, or damage to luggage."

The body of the face of the ticket contained statements of the rights of the passenger respecting his person and his baggage, the plaintiff's name, age, and occupation, the bills of fare for each day of the week, and the hours for meals, etc. At the bottom was printed the following:

"Passengers' luggage is carried only upon the conditions set forth on the back hereof."

Upon the back, among other printed matter, was the following:

"The company is not liable for loss of or injury to the passenger or his luggage, or delay in the voyage, whether arising from the act of God, the Queen's enemies, perils of the sea, rivers, or navigation, restraint of princes, rulers, and peoples, barratry, or negligence of the company's servants (whether on board the steamer or not), defect in the steamer, her machinery, gear, or fittings, or from any other cause of whatsoever nature."

When the plaintiff received his ticket, his attention was not called in any way to any limitation of the defendant's liabilty.

Knowlton, J. It is not expressly stated in the report, that the law of England was put in evidence as a fact in the case, but it seems to have been assumed at the trial, if not expressly agreed that this law should be considered, and the argument before this court has proceeded on the same assumption. It is conceded that the presiding justice correctly found and ruled as follows: "That the contract was a British contract; that, by the English law, a carrier may by contract exempt himself from liability, even for loss caused by his negligence; that in this case, as the carrier has so attempted, and the terms are broad enough to exonerate him, the question remains of assent on the part of the plaintiff." That part of his ruling which is called in question by the defendant is as follows: "This has been decided in Massachusetts to be a question of evidence, in which the lex fori is to govern; that, although it has been decided that the law conclusively presumes that a consignor knows and assents to the terms of a bill of lading or a shipping receipt which he takes without dissent, yet a passenger ticket, even though it be called a 'contract ticket,' does not stand on the same footing; that in this case assent is not a conclusion of law, and is not proved as a matter of fact."

The principal question before us is whether the plaintiff, by reason of his acceptance, and use of his ticket, shall be conclu-

sively held to have assented to its terms. It has often been decided, that one who accepts a contract, and proceeds to avail himself of its provisions, is bound by the stipulations and conditions expressed in it, whether he reads them or not. Rice v. Dwight Manuf. Co., 2 Cush. 80; Grace v. Adams, 100 Mass. 505; Hoadley v. Northern Transportation Co., 115 Mass. 304; Monitor Ins. Co. v. Buffum, 115 Mass. 343; Germania Insurance Co. v. Memphis & Charleston Railroad, 72. N. Y. 90. rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind. Grace v. Adams. 100 Mass. 505; Boston & Maine Railroad v. Chipman, 146 Mass. 107; Parker v. South Eastern Railway, 2 C. P. D. 416, 428; Harris v. Great Western Railway, 1 Q. B. D. 515; York Co. v. Central Railroad, 3 Wall. 107; Hill v. Syracuse, Binghamton & New York Railroad, 73 N. Y. 351. The cases in which it is held that one who receives a ticket that appears to be a mere check showing the points between which he is entitled to be carried, and that contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule. Brown v. Eastern Railroad, 11 Cush. 97; Malone v. Boston & Worcester Railroad, 12 Gray, 388; Henderson v. Stevenson, L. R. 2 H. L. Sc. 470; Quimby v. Vanderbilt, 17 N. Y. 306; Railway Co. v. Stevens, 95 U. S. 655. Such a ticket does not purport to he a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unnsual stipulations. The precise question in the present case is whether the "contract ticket" was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so, he would be expected to read it, and if he failed to do so, he is bound by its stipulations. covered with print and writing the greater part of two large quarto pages, and hore the signature of the defendant company, affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff is immaterial. Quimby v. Boston & Maine Railroad, 150 Mass.

365, and cases there cited. It contained elaborate provisions in regard to the rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day of the week. No one who could read could glance at it without seeing that it undertook expressly to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination. that particular, it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. In reference to this question, the same rules of law apply to a contract to carry a passenger, as to a contract for the transportation of goods. There is no reason why a consignor who is bound by the provisions of a bill of lading, which he accepts without reading, should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger. In Henderson v. Stevenson, ubi supra, the ticket was for transportation a short distance, from Dublin to Whitehaven, and the passenger was held not bound to read the notice on the back, because it did not purport to be a contract, but a mere check given as evidence of his right to carriage. In later English cases, it is said that this decision went to the extreme limit of the law, and it has repeatedly been distinguished from cases where the ticket was in a different form. Parker v. South Eastern Railway, 2 C. P. D. 416, 428; Burke v. South Eastern Railway, 5 C. P. D. 1; Harris v. Great Western Railway, 1 Q. B. D. 515. The passenger in the last mentioned case had a coupon ticket, and it was held that he was bound to know what was printed as a part of the ticket. Steers v. Liverpool, New York & Philadelphia Steamship Co. (57 N. Y. 1) is in its essential facts almost identical with the case at bar, and it was held that the passenger was bound by the conditions printed on the ticket. In Quimby v. Boston & Maine Railroad, ubi supra, the same principle was applied to the case of a passenger travelling on a free pass, and no sound distinction can be made between that case and the case at bar.

We are of opinion that the ticket delivered to the plaintiff purported to be a contract, and that the defendant corporation had a right to assume that he assented to its provisions. All these provisions are equally binding on him as if he had read them.

The contract being valid in England, where it was made, and the plaintiff's acceptance of it under the circumstances being equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy. Greenwood v. Curtis, 6 Mass. 358; Forepaugh v. Delaware, Lackawanna & Western Railroad, 128 Penn. St. 217, and cases cited; In re Missouri Steamship Co., 42 Ch. D. 321, 326, 327; Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397.

Judgment for the defendant.1

MALONE v. BOSTON & WORCESTER RAILROAD.

12 GRAY (Mass.), 388. - 1859.

Action of tort against the defendants as common carriers, for the loss upon their railroad of a trunk and its contents.

The ticket issued to plaintiff had printed upon its face, "Look on the back." On the back was a clause limiting the liability of defendant for baggage to fifty dollars, and a notice that other regulations were posted in the cars. In the cars was a similar notice as to liability for baggage. Plaintiff testified that he never saw the notice on the ticket or in the car.

The trial judge submitted to the jury the question whether the plaintiff ever assented to the limitation, and charged that the receiving of the ticket raised no legal presumption that plaintiff had the necessary notice. The jury returned a verdict for the plaintiff.

Dewey, J. This case must be held to be analogous to the case of *Brown* v. *Eastern Railroad* (11 Cush. 97), and may, like that, be decided without any adjudication upon the broader question whether a limitation of the liability of the railroad company as to the amount and value of the baggage of passengers trans-

¹ Accord: Zimmer v. N. Y. C. etc. R., 137 N. Y. 460; Ballou v. Earle, 17 R. I. 441,

ported on the road may not be effectually secured by the delivery of a ticket to the passenger so printed in large and fair type on the face of the ticket, that no one could read the part of the ticket indicating the place to which it purports to entitle him to be conveyed without also having brought to his notice the fact of limitation as to liability for his baggage. The present case as to the ticket only differs from the case of Brown v. Eastern Railroad, in having printed in small type on the face of the ticket, "Look on the back." But there is nothing on the face of the ticket alluding to the subject of baggage; no notice to look on the back for regulations as to baggage. The delivery of such a ticket does not entitle the railroad company to ask for instructions that there results therefrom a legal presumption of notice of the restricted liability as to the baggage of the passen-The ruling as to the placards posted in the cars was correct. and no legal presumption of notice arose therefrom. The court properly submitted the question of notice to the jury as a question of fact.

We have not particularly considered the question of liability of the defendants as to certain small items, if any, of the wearing apparel of the husband, that were contained in the lost trunk. The articles are stated in the bill of exceptions to have been "nearly wholly his wife's wearing apparel," and the court was not asked to direct the jury to exclude the other articles in assessing damages. Without expressing any opinion upon the point whether these articles, if any, of the husband's would be embraced in the baggage which the defendants assumed to transport as common carriers, the husband paying no fare for his personal transportation, the court are of opinion that in the present aspect of the case judgment should be entered generally on the verdict.

Exceptions overruled.1

1 Accord: Blossom v. Dodd, 43 N. Y. 264.

§ 4. Acceptance must be communicated by words or conduct.

WHITE v. CORLIES.

46 NEW YORK, 467. - 1871.

[Reported herein at p. 7.]

ROYAL INS. CO. v. BEATTY.

119 PENNSYLVANIA STATE, 6. - 1888.

Assumpsit to recover upon two policies of insurance.

At the close of the testimony, the defendant requested the court to charge the jury that there was no evidence of an acceptance by the defendant of the offer of the plaintiff to renew the policies, and to direct a verdict for the defendant. The court refused the request, and submitted the question to the jury. Verdict for plaintiff.

GREEN, J. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character, and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence, which contributed to the establishment of the relation.

But in any point of view it is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred and had not been formally renewed. At

the time of the fire, the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk, who took the two policies in question, along with other policies of another person, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed, and I went in and bound them. Q. State what was said and done. A. I went into the office of the Royal Company and asked them to bind the two policies of Mr. Beatty expiring to-morrow. The court: Who were the policies for? A. For Mr. Beatty. The court: That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The court: What did they say? A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "Q. Did you say anything about those policies (Robert Beatty's) at that time? A. No, sir; I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies and the night privilege for Mr. Priestly?' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir; and I asked the Royal Company to bind Mr. Beatty."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is, that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer, nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth

of the declared fact. It would then be only a question of hearing, which would be chiefly if not entirely for the jury. But here the utterance was a question and not an assertion, and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how then can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the court and not for the jury; for if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding or in doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies and obtained no answer, what was his duty? Undoubtedly to repeat his question until he obtained an answer. For his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly such silence is not an assent in any sense. There should be something done, or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of an agreement can staud. But what was the position of the plaintiff? He had asked the defendant to make a contract with him and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly it was his duty to speak again, and to take further action if he really intended to obtain the defendant's assent. For what he wanted was something affirmative and positive, and without it he has no status. But he desists, and does and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract.

The other facts proved and offered to be proved, but rejected improperly, as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request and made no answer, an inference of assent should be made. For the hearing of a request and not answering it is as consistent, indeed, more consistent, with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing there was, of course, no duty of speech.

Judgment reversed.

HOBBS v. MASSASOIT WHIP CO.

158 MASSACHUSETTS, 194.—1893.

Holmes, J. This is an action for the price of eelskins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if the skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem

to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See Bushell v. Wheeler, 15 Q. B. 442; Benjamin on Sales, §§ 162, 164; Taylor v. Dexter Engine Co., 146 Mass. 613, 615. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party, - a principle sometimes lost sight of in the cases. O'Donnell v. Clinton, 145 Mass. 461, 463; McCarthy v. Boston & Lowell Railroad, 148 Mass. 550, 552.

Exceptions overruled.

STENSGAARD v. SMITH.

43 MINNESOTA, 11. - 1890.

DICKINSON, J. This action is for the recovery of damages for breach of contract. The rulings of the court below, upon the trial, were based upon its conclusion that no contract was shown to have been entered into between these parties. We are called upon to review the case upon this point. The plaintiff was engaged in business as a real-estate broker. On the 11th of December, 1886, he procured the defendant to execute the following instrument, which was mostly in printed form:

"ST. PAUL, Dec. 11, 1886.

"In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property hereinafter mentioned, I have hereby given to said L. T. Stensgaard the exclusive sale, for three months from date, of the following property, to wit: (Here follows a description of the property, the terms of sale, and some other provisions not necessary to be stated.) I further agree to pay said L. T. Stensgaard a commission of two and one-half per cent on the first \$2000, and two and one-half per cent on the balance of the purchase price, for his services rendered in selling of the above-mentioned property, whether the title is accepted or not, and also whatever he may get or obtain for the sale of said property above \$17,000 for such property, if the property is sold.

"JOHN SMITH."

The evidence showed that the plaintiff immediately took steps to effect the sale of the land, posted notices upon it, published advertisements in newspapers, and individually solicited purchasers. About a month subsequent to the execution by the defendant of the above instrument, he himself sold the property. This constitutes the alleged breach of contract for which a recovery of damages is sought.

The court was justified in its conclusion that no contract was shown to have been entered into, and hence that no cause of action was established. The writing signed by the defendant did not of itself constitute a contract between these parties. In terms indicating that the instrument was intended to be at once operative, it conferred present authority on the plaintiff to sell the land, and included the promise of the defendant that, if the plaintiff should

sell the land, he should receive the stated compensation. This alone was no contract, for there was no mutuality of obligation, nor any other consideration for the agreement of the defendant. The plaintiff did not by this instrument obligate himself to do anything, and therefore the other party was not bound. Bailey v. Austrian, 19 Minn. 465 (535); Tarbox v. Gotzian, 20 Minn. 122 (139). If, acting under the anthority thus conferred, the plaintiff had, before its revocation, sold the land, such performance would have completed a contract, and the plaintiff would have earned the compensation promised by the defendant for such performance. Andreas v. Holcombe, 22 Minn. 339; Ellsworth v. Southern Minn. Ry. Extension Co., 31 Minn. 543. But so long as this remained a mere present authorization to sell, without contract obligations having been fixed, it was revocable by the defendant. The instrument does, it is true, commence with the words: "In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property," etc.; but no such agreement on the part of the plaintiff was shown on the trial to have been actually made, although it was incumbent upon him to establish the existence of a contract as the basis of his action. This instrument does not contain an agreement on the part of the plaintiff, for he is no party to its execution. It expresses no promise or agreement except that of the defendant. It may be added that the language of the "consideration" clause is not such as naturally expresses the fact of an agreement having been already made on the part of the plain-Of course, no consideration was necessary to support the present, but revocable, authorization to sell. It is difficult to give any practical effect to this clause in the construction of the instrument. It seems probable, in the absence of proof of such an agreement, that this clause had no reference to any actual agreement between these parties, but was a part of the printed matter which the plaintiff had prepared for use in his business, with the intention of making it effectual by his own signature. If he had appended to this instrument his agreement to accept the agency, or even if he had signed this instrument, this clause would have had an obvious meaning.

This instrument, executed only by the defendant, was effectual, as we have said, as a present, but revocable, grant of authority to

sell. It involved, moreover, an offer on the part of the defendant to contract with the plaintiff that the latter should have, for the period of three months, the exclusive right to sell the land. action is based upon the theory that such a contract was entered into; but, to constitute such a contract, it was necessary that the plaintiff should in some way signify his acceptance of the offer, so as to place himself under the reciprocal obligation to exert himself during the whole period named to effect a sale. express agreement was shown. The mere receiving and retaining this instrument did not import an agreement thus to act for the period named, for the reason that, whether the plaintiff should be willing to take upon himself that obligation or not, he might accept and act upon the revocable authority to sell expressed in the writing; and if he should succeed in effecting a sale before the power should be revoked, he would earn the commission specified. In other words, the instrument was presently effectual and of advantage to him, whether he chose to place himself under contract obligations or not. For the same reason the fact that for a day or a month he availed himself of the right to sell conferred by the defendant, by attempting to make a sale, does not justify the inference, in an action where the burden is on the plaintiff to prove a contract, that he had accepted the offer of the defendant to conclude a contract covering the period of three months, so that he could not have discontinued his efforts without rendering himself liable in damages. In brief, it was in the power of the plaintiff either to convert the defendant's offer and authorization into a complete contract, or to act upon it as a naked revocable power, or to do nothing at all. He appears to have simply availed himself, for about a month, of the naked present right to sell if he could do so. He cannot now complain that the landowner then revoked the authority which was still unexecuted. It may be added that there was no attempt at the trial to show that the plaintiff notified the defendant that he was endeavoring to sell the land; and there is but little, if any, ground for an inference from the evidence that the defendant in fact knew it.

The case is distinguishable from those where, under a unilateral promise, there has been a performance by the other party of services, or other thing to be done, for which, by the terms of

the promise, compensation was to be made. Such was the case of Goward v. Waters (98 Mass. 596), relied upon by the appellant as being strictly analogous to this case. In the case before us, compensation was to be paid only in case of a sale of the land by the plaintiff. He can recover nothing for what he did, unless there was a complete contract; in which case, of course, he might have recovered damages for its breach.

Order affirmed.

(A motion for a reargnment of this case was denied April 9, 1890.)

Note. — Upon the question whether the acceptance of a guaranty must be express or may be implied from the giving of credit, see *Davis* v. *Wells*, 104 U. S. 159; *Powers* v. *Bumcratz*, 12 Oh. St. 273; *Douglass* v. *Howland*, 24 Wend. 35; *Union Bk.* v. *Coster's Ex'rs*, 3 N. Y. 203.

§ 5. Acceptance is communicated when it is made in a manner prescribed, or indicated by the offerer.

TAYLOE v. MERCHANTS' FIRE INS. CO.

9 HOWARD (U. S.), 390.-1850.

Nelson, J. This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the court below was this. William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg in that State, for an insurance upon his dwelling-house to the amount of \$8000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the State of Alabama on business, and would

not return till February following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2d of December, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for \$57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the centre building of the dwelling-house in the meantime, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy or pay the loss.

A bill was filed in the court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is, that the contract of insurance was not complete at the time the loss happened, and therefore that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defense.

- 1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,
 - 2. The non-payment of the premium.

The first position assumes that, where the company have

made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, expressed or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the

acceptance must succeed the offer after the lapse of some interval of time; and if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes, "Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars, and the business is concluded"; obviously enough importing, that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of Adams v. Lindsell (1 Barn. & Ald. 681) and Mactier's Adm'rs v. Frith (6 Wend. 104) are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance.

This is also the effect of the case of Eliason v. Henshaw (4 Wheat. 228) in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

2. The next position against the claim is the non-payment of the premium.

One of the conditions annexed to the policies of the company is, that no insurance will be considered as made or binding until the premium be actually paid; and one of the instructions to the agent was, that no credit should be given for premiums under any circumstances.

But the answer to this objection is, that the premium, in judgment of law, was actually paid at the time the contract became complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise; the agent, therefore, was at liberty to exercise a discretion in the matter, and prescribe the mode of payment; and, accordingly, we find him directing, in this case, that it may be paid by a check payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn, at

all times from the date of the check till it was received by the agent, sufficient to meet it; and that it would have been paid on presentment.

It is not doubted that, if the check for the premium had been received by the agent from the hands of the insured, it would have been sufficient; and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amounts, in judgment of law, to the same thing. Doubtless, if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent, in this respect, trusted to his responsibility, having full confidence in his ability and good faith in the transaction.

Decree reversed.1

§ 6. Offer creates no legal rights until acceptance, but may lapse or be revoked.

(i.) Lapse.

a. Lapse by death.

PRATT v. TRUSTEES.

93 ILLINOIS, 475. - 1879.

Action on notes. Plaintiff had judgment below.

Scholffeld, J. Appellees obtained judgment in the county court of Kane County against Mary L. Pratt, as administratrix of the estate of Philemon B. Pratt, deceased, on two promissory notes, executed by the deceased to the appellees on the 6th of July, 1871, — one for \$300, payable one year after date, and the other for the sum of \$327.50, payable two years after date, and both bearing interest at the rate of ten per cent per annum. Appeal was taken from that judgment to the Circuit Court of Kane County, where the cause was again tried at its October term, 1876, resulting, as

¹ Accord: Mactier v. Frith, 6 Wend. 103; Vassar v. Camp, 11 N. Y. 441; Trevor v. Wood, 36 N. Y. 307; Wheat v. Cross, 31 Md. 99; Patrick v. Bowman, 149 U. S. 411; Perry v. Mount Hope Iron Co., 15 R. I. 380. In Vassar v. Camp it is held to be no defense to an action for breach of contract that the letter of acceptance was never received. Contra: M'Culloch v. Eagle Ins. Co., 1 Pick. 278; Lewis v. Browning, 130 Mass. 173.

before, in a judgment in favor of appellees for the amount of the notes, principal and interest. Mary L. Pratt, administratrix, appeals from that judgment, and brings the rulings of the Circuit Court before us for review.

The defense interposed to the notes is, that they were executed without any valid consideration.

The question to be considered is, did Pratt's death revoke the promise expressed in the notes, no money having been expended, or labor bestowed, or liability of any kind incurred, prior to his death, upon the faith of that promise?

The purpose in giving the notes was to enable the church represented by appellees to purchase a bell. The cost of a bell of a particular size, etc., was estimated by Pratt, and he gave his notes for the amount of the estimate, intending that when the notes were paid the money should be devoted to paying for such a bell; and when the notes matured, at Pratt's suggestion to let them stand, because, as he alleged, bell metal was getting cheaper, and they would thereby be enabled to procure a larger bell, no effort was made to collect the notes, and they were permitted to remain just as they were; but there was no undertaking on the part of appellees nor the church which they represent to procure a bell, and there is no proof of any act done, or liability incurred by appellees, or any one else, in reliance upon these notes, before the death of Pratt. It is shown that the bell has been procured. and probably there is evidence sufficient to show that this has been done on the faith of those notes, but it appears with a reasonable certainty that this has been since Pratt's death. If a contract therefor was made in Pratt's life-time, the record unfortunately does not show it. Collection of the notes cannot be enforced as a promise to make a gift. Pope v. Dodson, 58 Ill. 360; Blanchard v. Williamson, 70 Id. 652. Where notes are given by way of voluntary subscription, to raise a fund or promote an object, they are open to the defense of a want of consideration, unless money has been expended, or liabilities incurred. which, by a legal necessity, must cause loss or injury to the person so expending money, or incurring liability, if the notes are not paid. 1 Pars. on Bills and Notes, 202; 1 Pars. on Cont. 377, et seq.

And so it has been held that the payee of a promissory note given to him in the expectation of his performing service, but without any contract binding him to serve, cannot maintain an action upon it. Hulse v. Hulse, 17 C. B. 711; 84 Eng. Com. Law, 709.

In the absence of any one claiming rights as a bona fide assignee before maturity, it is not perceived that promissory notes, executed as these were, are, in any material respect, different from an ordinary subscription whereby the subscriber agrees under his hand, to pay so much in aid of a church, school, etc., where there is no corresponding undertaking by the payee.

The promise stands as a mere offer, and may, by necessary consequence, be revoked any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability, on the faith of the promise, which gives the right of action, and without this there is no right of action. *McClure* v. *Wilson*, 43 Ill. 356, and cases there cited; *Trustees* v. *Garvey*, 53 Id. 401; S. C., 5 Am. Rep. 51; Baptist Education Soc. v. Carter, 72 Id. 247.

Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires some one capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man.

If the payees named in the notes may be held agents of the promisor, with power to contract for work to be done and money expended upon the faith of the notes, the case of Campanari v. Woodburn (15 C. B. 400; 80 Eng. Com. Law, 400) is directly in point, and holds that the death of the promisor was a revocation of the agency. In that case the plaintiff alleged that it was agreed between him and the defendant's intestate that he should endeavor to sell a certain picture, and that if he succeeded the intestate should pay him 100 pounds; that he did so endeavor while the testator was alive, and through the efforts then made was enabled to effect a sale after the testator's death, but that

the defendant had refused to pay 100 pounds. The count was held not to show a cause of action. Jervis, C. J., said that if the testator had countermanded the sale, he clearly would not have been liable for commissions, although the plaintiff might have recovered for services already rendered and charges and expenses previously incurred. A fortiori the defendant was not responsible when the revocation proceeded from the act of God.

An analogous case is *Michigan State Bank* v. *Leavenworth* (2 Williams [Vt.], 209), where it was held that the operation of a letter of credit was confined to the life of the writer, and that no recovery can be had upon it for goods sold or advances made after his death.

The question that has been raised, in some cases, whether a party acting in good faith upon the belief that the principal is alive, may recover, does not arise here, as there is nothing in the evidence to authorize the inference that the bell here was purchased under the belief that Pratt was still alive.

We are of the opinion, on the record before us, the judgment below was unauthorized. It must therefore be reversed and the cause remanded. Judgment reversed.

b. Lapse by failure to accept in manner prescribed.

ELIASON et al. v. HENSHAW.

4 WHEATON (U. S.), 225. - 1819.

Error to the Circuit Court for the District of Columbia.

Washington, J. This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour, at a stipulated price. The evidence of this contract, given in the court below, is stated in a bill of exceptions, and is to the following effect:

A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Capt. Conn informs us that

¹ Accord: Twenty-Third St. Bap. Ch. v. Cornell, 117 N. Y. 601. Cf. Cottage Street Church v. Kendall, 121 Mass. 528. For a similar case of revocation by insanity, see Beach v. First M. E. Church, 96 Ill. 177.

you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it, when the markets will answer to advantage, or we will purchase at market price, when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you \$9.50 per barrel, deliverable the first water, in Georgetown, or any service we can. should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add, "Please write by return of wagon, whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant, at his mill, at Mill Creek, distant about twenty miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant, on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs, at Georgetown, and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first water, at \$9.50 per barrel, I accept; shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary -- payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour; more particularly, as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted." The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not, in fact, return

in the defendant's employ. The flour was sent down to Georgetown some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury, that if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of \$9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given. The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for? If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same \$9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was dispatched. This wagon was at that time in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate, by the usual length of time which was employed by this wagon in traveling from Harper's Ferry to Mill Creek and back again with a load of flour, about what time they should receive the desired answer, and therefore it was entirely unimportant whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to

Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiffs' offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. It is no argument, that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties, and the court ought, therefore, to have given the instruction to the jury, which was asked for.

Judgment reversed, and cause remanded, with directions to award a venire facias de novo.

c. Lapse by expiration of time.

MACLAY v. HARVEY.

90 ILLINOIS, 525. — 1878.

Scholffeld, J. Appellant brought assumpsit against appellee in the court below, on an alleged contract whereby the latter employed the former to take charge of the millinery department of his store in Monmouth, in this State, for the season commencing in April and ending in July, in the year 1876, and to pay her therefor \$15 per week.

¹ For lapse by conditional acceptance, see Minneapolis etc. Ry. v. Columbus Rolling Mill, 119 U. S. 149, post, p. 74.

The judgment was in favor of the appellee, and appellant now assigns numerous errors as grounds for its reversal.

In our opinion, the case may be properly disposed of by the consideration of a single question. Appellant's right of recovery is based entirely upon an alleged special contract, and unless there was such a contract the judgment below is right, however erroneous may have been the rulings under which it was obtained.

After some preliminary correspondence, which is not before us, appellant, who was then residing in Peoria, received from appellee the following, by mail:

"Monmouth, Ill., March 9, 1876.

"Miss L. Maclay, Peoria, Ill.: I have been trying to find your address for some time, and was informed last evening that you were in Peoria. I write to inquire if you intend to work at millinery this season, and if you have made any arrangements or not. If you have not, can you take charge of my stock this season? And if we can agree, I would want you for a permanent trimmer.

"Please notify me by return mail, and terms, and we can confer further.

"Yours in haste,

"JOHN HARVEY."

"Formerly Jno. Harvey & Co., when you trimmed for me."

Appellant's reply to this is not before us. She says she stated her terms in it, and thereafter appellee wrote her the following, which she also received by mail:

"Monmouth, Ill., March 21, 1876.

"Miss L. Maclay, Peoria, Ill.: Your favor was received in due time, and contents noted. You spoke of wages at \$15 per week, and fare one way. You will want to go to Chicago, I presume, and trim a week or ten days.

"I would like for you to trim at H. W. Wetherell's or at Keith Bros. I will give you \$15 per week and pay your fare from Chicago to Monmouth, and pay you the above wages for your actual time here in the house at that rate per season.

"I presume that the wholesale men will allow you for your time in the house. You will confer a favor by giving me your answer by return mail. "Yours,

"John Harvey."

Appellant says she received this in the afternoon, and replied the next day by postal card, addressed to appellee, at Monmouth, as follows:

"PEORIA, March 23.

"Mr. Harvey: Yours was promptly received, and I will go up to Chicago next week, and when my services are required you will let me know.

"Very respectfully,

"L. MACLAY."

Appellant did not place this in the post-office herself, but she says she gave it to a boy who did errands about the house of her sister, with whom she was then staying, directing him to place it in the office. The postmark on the card, which is shown to be always placed on mail matter the same day it is put in the office, shows that the card was not mailed until the 25th of March.

Appellee receiving no reply from appellant, on Monday morning, March 27, went to Peoria and endeavored to engage another milliner, and failing in this, endeavored to find appellant, but was unable to do so, and then returned to Monmouth, when he received the appellant's postal card, which had come to the office there during his absence. On Wednesday night of the same week appellee left Monmouth for Chicago, arriving at the last-named place on the following Thursday, March 30. Finding that the appellant was neither at Keith Bros. nor at Wetherell's, he proceeded to employ another milliner, and on the same day, and before leaving Chicago, wrote and mailed a letter directed to appellant's address at Peoria, notifying her of that fact, but this letter, in consequence of appellant's absence from Peoria, she did not receive for some time afterward.

The millinery season commences from the 5th to the 10th of April and ends from the 20th of June to the 4th of July, as shown by the evidence. Appellee had not laid in his spring stock when he was corresponding with appellant, and he started to New York, from Chicago, for that purpose, on the evening of the day on which he addressed the letter to appellant notifying appellant of his employment of another milliner, the evening of the 30th of March. Appellant says she left Peoria for Chicago on Friday, which must have been the 31st of March. On arriving at Chicago she went to Wetherell's, and failing to get employment there, did not go to Keith Bros., but went to another house in the same line of business, where she remained some days, and

on the 8th of April she notified appellee, by letter, that she was sufficiently informed as to the "new ideas of trimming" and was ready to enter his service. Appellee replied to this, reciting the disappointments he claimed to have met with on her account, and again notifying her that he did not require her services.

If a contract was consummated between the parties, it was by the mailing of appellant's postal card on the 25th of March. Appellee's letter of the 21st cannot be regarded as the consummation of a contract, because it restates the terms with some variation, though it may be but slight, and requires an acceptance upon the terms thus stated. This, until unequivocally accepted, was only a mere proposition or offer. Hough v. Brown, 19 N. Y. 111.

It was said by the Lord Chancellor in *Dunlop* v. *Higgins* (1 H. L. Cas. 387):

"Where an individual makes an offer by post, stipulating for, or by the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavoring to excuse himself from a liability."

This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law, as applicable to the present case. It is clear here that the nature of the business demanded a prompt answer, and the words, "you will confer a favor by giving me your answer by return mail," do, in effect, "stipulate" for an answer by return mail. Taylor v. Rennie, 35 Barb. 272. The evidence shows that there were two daily mails between Peoria and Monmouth, one arriving at Monmouth at 11 o'clock A.M., and the other at 6 o'clock P.M., and it did not require more than one day's time between the points. Appellee's letter to appellant making the offers, it will be remembered, bears date March 21st. Assuming the date of the appellant's postal card (which, she says, was written on the morning after she received appellee's letter) to be correct, she received appellant's letter on the even-

ing of the 22d. Appellee was, therefore, entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or at farthest, by the morning of the 24th; but appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d, to have him mail it. Her duty was not to place an answer in private hands, but in the post-office. The boy was her agent, not that of the appellee, and his negligence in mailing the postal card was her negligence.

The question whether it would not have equally subserved appellee's object had he treated the postal card of appellant as the consummation of a contract is irrelevant. Appellant seeks to recover upon the strict letter of a special contract, and it is therefore incumbent upon her to prove such contract. It is required of her, as we have seen, to prove an acceptance of appellee's offer within the time to which it was limited — that is to say, by the placing in the post-office of an answer unequivocally accepting the offer in time for the return mail, which she did not do. Appellee was therefore under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance was not in time, and in order to fix a liability thereby upon the appellee, it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so.

Appellee was led by the postal card of appellant to believe that he would, when he arrived at Chicago on Thursday, find her either at Wetherell's or at Keith Bros. Had he done so, it was his intention to treat the contract as closed; but she was not there, and this intention was not acted upon, and so it is to be considered as if it had never existed. Appellee, not finding appellant at Wetherell's or Keith Bros., as she had led him to believe he would, had no reason to assume that she was, in good faith, acting upon the assumption that her postal card had closed the contract, and he cannot therefore be held estopped from denying that it was not posted in time. In view of the lateness of the

season and the danger to appellee's business from delay, of all which appellant was aware, it cannot be said appellee acted with undue haste in engaging another milliner. The judgment is affirmed.

Judgment affirmed.

DICKEY, J., dissented.

MINNESOTA OIL CO. v. COLLIER &c. CO.

4 DILLON (U. S. C. C.), 431. — 1876.

Action for oil sold by plaintiff to defendant. Defendant sets up counter-claim for damages for non-delivery of oil bought of plaintiff.

Defendant's counter-claim rests on these facts. On July 31st, plaintiff offered defendant by telegraph a quantity of oil at fifty-eight cents. The telegram was sent on Saturday, but was not delivered to defendant until Monday, August 2d, between eight and nine o'clock. On Tuesday, August 3d, about nine o'clock, defendant deposited a telegram accepting the offer. Later in the day, plaintiff sent defendant a telegram withdrawing the offer of July 31st, but defendant replied that sale was effected, and inquired when shipment would follow.

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous, and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon.

It is urged by the defendant that the dispatch of Tuesday, August 3, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil.

The plaintiff, on the contrary, claims, first, that the dispatch accepting the proposition made July 31st was not received until after the offer had been withdrawn; second, that the acceptance of the offer was not in due time, that the delay was unreasonable, and therefore no contract was completed.

Nelson, J. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph-office for transmission. See Am. Law Reg. Vol. 14, No. 7, 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also Trevor v. Wood, 36 N. Y. 307.

The reason for this rule is well stated in Adams v. Lindsell (1 Barn. & Ald. 681). The negotiation in that case was by post. The court said, "that if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that it might so go on ad infinitum." See also 5 Pa. St. 339; 11 N. Y. 441; Mactier v. Frith, 6 Wend. 103; 48 N. H. 14; 8 English Common Bench, 225. In the case at bar the delivery of the message at the telegraph-office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8.53 of the clock on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. 1 Parsons on Contracts, 482, 483.

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph-office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph-office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject-matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (Vol. 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which, as rational men, they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied.

Judgment accordingly.

(ii.) Revocation.

a. An offer may be revoked at any time before acceptance.

FISHER v. SELTZER.

23 PENNSYLVANIA STATE, 308. - 1854.

Action by Fisher, late sheriff, to recover from Seltzer the difference between the amount bid at a sale of property and the amount realized at a second sale, with costs, etc. The sheriff, before the sale, had prescribed certain rules or conditions, among which were that "no person shall retract his or her bid," and that if a bidder failed to comply with all conditions of the sale, "he shall pay all costs and charges." At the sale Seltzer bid seven thousand dollars, under the belief that the property was to be sold free of a certain mortgage for six thousand dollars. Discovering his error, he retracted his bid before it was accepted, but the sheriff, denying this right of retraction, knocked down the property to him. He refused to take it. On a resale it brought only one thousand five hundred dollars. Judgment was entered for plaintiff for the costs of the second sale only. Plaintiff prosecuted a writ of error.

By court, Lewis, J. Mutuality is so essential to the validity of contracts not under seal, that they cannot exist without it. A bid at auction, before the hammer falls, is like an offer before acceptance. In such a case there is no contract, and the bid may be withdrawn without liability or injury to any one. The brief interval between the bid and its acceptance is the reasonable time which the law allows for inquiry, consideration, correction of mistakes, and retraction. This privilege is of vital importance in sheriffs' sales, where the rule of caveat emptor operates with all its vigor. It is necessary, in order that bidders may not be entrapped into liabilities never intended. prudent persons would be discouraged from attending these sales. It is the policy of the law to promote competition, and thus to produce the highest and best price which can be obtained. interests of debtors and creditors are thus promoted. By the opposite course, a creditor might occasionally gain an advantage, but an innocent man would suffer unjustly, and the general result

would be disastrous. A bidder at sheriff's sale has a right to withdraw his bid at any time before the property is struck down to him, and the sheriff has no authority to prescribe conditions which deprive him of that right. Where the bid is thus withdrawn before acceptance, there is no contract, and such a bidder cannot, in any sense, be regarded as a "purchaser." He is, therefore, not liable for "the costs and charges" of a second sale. Where there has been no sale, there can be no resale.

The judgment ought not to have been in favor of the plaintiff, even for "the costs and charges" of the second sale; but as the defendant does not complain, we do not disturb it.

Judgment affirmed.

WHITE v. CORLIES.

46 NEW YORK, 467.-1871.

[Reported herein at p. 7.]

b. An offer is made irrevocable by acceptance.

COOPER v. LANSING WHEEL COMPANY.

94 MICHIGAN, 272. - 1892.

Assumpsit. Defendant demurred to the declaration and the demurrer was sustained. Plaintiffs bring error.

Montgomery, J. This is an appeal from a judgment sustaining a demurrer to plaintiffs' declaration.

The first count of the declaration alleges an agreement "whereby the said defendant did undertake, promise, and agree, to and with the plaintiffs, to furnish, sell, and deliver to said plaintiffs all such number or quantity of wheels, at and for an agreed price, as said plaintiffs should or might require or want, during the season of the year 1890, in their said business of manufacturing;" that during the season of 1890 plaintiffs agreed to order, and did order, of defendant, all of such wheels as they might or should want or require in their said business; that certain orders so given were filled, and that certain other orders given in November and December, 1890, defendant refused to fill.

The second count sets forth a written agreement, which is as follows:

"Owosso, Mich., Dec. 16, 1889.

"Mess. Lansing Wheel Co., Lansing, Mich.

"Gentlemen: Please enter our order for what wheels we may want during the season of 1890, at following prices and terms: B, \$6; C, \$5; D, \$4 per set, f. o. b. Owosso, thirty days. All the wheels to be good stock, and smooth. Should we want a few D wheels to be extra nice stock, all selected white, they are to be furnished at same price, not to exceed 10 set in a 100.

"Very respectfully yours,
"Owosso Cart Co."

Upon receipt of this instrument, defendant indorsed thereon the following: "Accepted. Lansing Wheel Co." Then follow the allegations as to the giving and filling of certain orders, and the refusal to fill certain other orders which were given.

The defendant demurred to this declaration, the substantial ground of demurrer being that there was no mutuality of contract between the parties.

It was early held in England that a proposition to sell goods at a certain specified price, and to give the offeree a stated time in which to accept or reject the offer, did not make a binding contract which could not be withdrawn before acceptance. See Cooke v. Oxley, 3 Term R. 653. The doctrine of this case has not. however, remained unchallenged. Mr. Story, in his work on Sales, expresses the opinion that the rule is unjust and inequita-Section 127. He contends that the grant of time to accept ble. the offer is not made without consideration. He suggests as one sufficient legal consideration the expectation or hope of the offerer, and further suggests that the making of such an offer might betray the other party into a loss of time and money, by inducing him to make examination, and to inquire into the value of the goods offered, and this inconvenience assumed by him is a sufficient consideration for the offer.

There is much force in this reasoning, but it has not prevailed to abate the doctrine of *Cooke* v. *Oxley* further than this: That it is now generally held that if a proposition be made, to be

accepted within a given time, it constitutes a continuing offer, which, however, may be retracted at any time. But if, at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract. It was therefore within the power of defendant, in the present case, on the authority of the cases cited, to withdraw the offer made at any time before the plaintiffs had acted upon it.

Authorities may be found which go further than this. The case of Bailey v. Austrian (19 Minn. 535) holds that a contract by which defendant agreed to supply plaintiffs with all the pig iron wanted by them in their business until December 31 next ensuing, at specified prices, and the plaintiffs simultaneously promised to purchase of defendant all of the iron which they might want in their said business during the time mentioned, at said prices, is not a mutual contract which can be enforced, on the ground that the plaintiffs did not engage to want any quantity whatever. The same court, in Tarbox v. Gotzian (20 Minn. 139) reaffirm this doctrine.

In Keller v. Ybarru (3 Cal. 147) plaintiff counted upon an agreement by the defendant, whereby he undertook to sell and deliver to the plaintiff so many of the grapes then growing in his vineyard as the plaintiff should wish to take, for which the plaintiff agreed to pay the defendant 10 cents per pound on delivery. The plaintiff averred that he subsequently notified the defendant that he wished to take 1900 pounds of grapes, and tendered the \$190 in payment therefor, and requested the defendant to deliver such grapes to the plaintiff, but defendant refused to deliver the same, or any part thereof. The court held that this agreement, when first entered into, amounted to an offer upon the part of defendant, which the plaintiff had a right to accept or reject, and the defendant to retract at any time before acceptance; but that, when the plaintiff named the quantity of grapes which he desired to take under the offer of defendant, the contract was complete, and both parties were bound by it. Substantially the same doctrine was held in Smith v. Morse, 20 La. Ann. 220.

In Railroad Co. v. Bartlett (3 Cush. 224) it was held that a proposition in writing to sell land at a certain price, if taken within 30 days, is a continuing offer, which may be retracted at any

time; but if, not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract.

So it is generally held that in suits upon unilateral contracts, if the defendant has had the benefit of the consideration for which he bargained, he can be held bound. Jones v. Robinson, 17 Law J. Exch. 36; Mills v. Blackall, 11 Q. B. 358; Morton v. Burn, 7 Adol. & E. 19; Kennaway v. Treleavan, 5 Mees. & W. 498; Richardson v. Hardwick, 106 U. S. 255.

If it be held, as we think the correct doctrine is, that an offer to furnish such goods as the plaintiff may want within a stated time may, upon acceptance by the offeree before withdrawal, constitute a valid contract, it is difficult to see why, if the offeree orders any portion of the goods, and the offerer has the benefit of the sale, the entire contract may not become valid and bind-This certainly would constitute a sufficient consideration. If in the present case the defendant had, in consideration of the present sale and delivery to the plaintiffs of one lot of wheels at a stated price, and for which the defendant received its pay, further agreed to furnish such further quantity of wheels as the plaintiffs might desire during the season, it would seem that a purchase of the one lot, as offered, would afford a sufficient consideration for defendant's undertaking. This view is adopted in England.

In Bishop on Contracts, section 78, it is said:

"Where it is admitted that there is nothing for A's promise to rest on but B's promise, if B has not promised, A's promise rests on nothing, and is void. There may be cases in seeming contradiction to this. If there are any really so, they are not to be followed. In one case, parties agreed that one of them should supply the other during a designated period with certain stores, as the latter might order. He made an order, which was filled; then made another, which was declined; and, on suit brought, the defendant rested his case on the lack of mutuality in the contract, which, he contended, rendered it void. Plainly it stood in law as a mere continuing offer by the defendant; but when the plaintiff made an order, he thereby accepted the offer to the extent of the order, and it was too late for the other to recede. So judgment went for the plaintiff."

See Railway Co. v. Witham, L. R. 9 C. P. 16. We think the doctrine of this case is sound, and that it should control the present case.

Judgment should be reversed, with costs, and defendant given leave to plead over.

The other Justices concurred.1

c. An offer under seal is irrevocable.

McMILLAN v. AMES.

33 MINNESOTA, 257. — 1885.

VANDERBURGH, J. On the day it bears date the defendant executed and delivered to James McMillan & Co. the following covenant or agreement under seal, which was subsequently assigned to the plaintiff:

[Here follows a copy of the instrument.]

By the terms of this instrument, which is admitted to have been sealed by defendant, he covenanted to convey the premises upon the consideration and condition of the payment by the covenantees of the sum named, on or before the date fixed in the writing. Before performance on their part, the defendant notified them of his withdrawal and rescission of the promise and obligation embraced in such written instrument, and thereafter refused the tender of payment and offer of performance by the plaintiff in conformity therewith, as alleged in the complaint, and within the time limited. On the trial, it appearing that such notice of rescission had been given, the court rejected plaintiff's offer to introduce the writing in evidence, and dismissed the action.

The only question presented on this appeal is whether defendant's promise or obligation was *nudum pactum* and presumptively invalid for want of a consideration, or whether, being in the nature of a covenant, the defendant was bound thereby, subject to the performance of the conditions by the covenantees.

Apart from the effect of the seal as evidencing a consideration binding the defendant to hold open his proposition, or rather validating his promise subject to the conditions expressed in the writing, it is clear that such promise, made for a consideration

¹ Accord: Wells v. Alexandre, 130 N.Y. 642; National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427. Cf. Moulton v. Kershaw, post, p. 67.

thereafter to be performed by the plaintiff at his election, would take effect as an offer or proposition merely, but would become binding as a promise as soon as accepted by the performance of the consideration, unless previously revoked or it had otherwise ceased to exist. Langdell on Cont. 70; Boston & M. R. R. v. Bartlett, 3 Cush. 224, 228. In the case cited there was a proposition to sell land by writing not under seal. The court held the party at liberty to withdraw his offer at any time before acceptance, but not after, within the appointed time, because until acceptance it was a mere offer, without a consideration or a corresponding promise to support it, and the court say: "Whether wisely or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached."

If, however, his promise is binding upon the defendant, because contained in an instrument under seal, then it is not a mere offer, but a valid promise to convey the land upon the condition of payment. All that remained was performance by plaintiff within the time specified to entitle him to a fulfilment of the covenant to convey. Langdell on Cont. 178, 179. As respects the validity or obligation of such unilateral contracts, the distinction between covenants and simple contracts is well defined and established. Anson, Cont. 12; Chit. Cont. 5; Leake, Cont. 146; 1 Smith, Lead Cas. (7th ed.) 698; Wing v. Chase, 35 Me. 260; Willard v. Tayloe, 8 Wall. 557.

In Pitman v. Woodbury (3 Exch. 4, 11) Parke, B., says: "The cases establish that a covenantee in an ordinary indenture, who is a party to it, may sue the covenantor, who executed it, although he himself never did; for he is a party, although he did not execute, and it makes no difference that the covenants of the defendant are therein stated to be in consideration of those of the covenantee. Of this there is no doubt, nor that a covenant binds without consideration." Morgan v. Pike, 14 C. B. 473, 484; Leake, Cont. 141. The covenantee in such cases may have the benefit of the contract, but subject to the conditions and provisos in the deed. The obligations frequently take the form of bonds, which is only another method of forming a contract, in which a party binds himself as if he had made a contract to perform; a consideration being necessarily implied from the solemuity of the

instrument. The consideration of a sealed instrument may be inquired into; it may be shown not to have been paid (Bowen v. Bell, 20 John. 338), or to be different from that expressed (Jordan v. White, 20 Minn. 77 [91]; McCrea v. Purmort, 16 Wend. 460), or as to a mortgage that there is no debt to secure (Wearse v. Peirce, 24 Pick. 141), etc.; but, except for fraud or illegality, the consideration implied from the seal cannot be impeached for the purpose of invalidating the instrument or destroying its character as a specialty.

It is true that equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration, but at the same time it will not on such grounds interfere to set it aside. But no reason appears why equity might not have decreed specific performance in this case (had the land not been sold), because the substantial and meritorious consideration required by the court in such case would consist in that stipulated in the instrument as the condition of a conveyance, performance of which by the plaintiff would have been exacted as a prerequisite to relief, so as to secure to defendant mutuality in the remedy, and all his rights under the The inquiry would not, in such case, be directed to the constructive consideration evidenced by the seal, for a mere nominal consideration would have supported the defendant's offer or promise upon the prescribed conditions. Leake, Cont. 17, 18; Western R. Co. v. Babcock, 6 Met. 346; Yard v. Patton, 13 Pa. St. 278, 285; Candor's Appeal, 27 Pa. St. 119.

If, then, defendant's promise was irrevocable within the time limited, plaintiff might certainly seek his remedy for damages, upon the facts alleged in the pleadings, upon showing performance or tender thereof on his part.

There is a growing tendency to abrogate the distinction between sealed and unsealed instruments; in some States by legislation, in others to a limited extent by usage or judicial recognition. State v. Young, 23 Minn. 551; 1 Pars. Cont. 429. But the significance of the seal as importing a consideration is everywhere still recognized, except as affected by legislation on the subject. It has certainly never been questioned by this court. In Pennsylvania the courts allow a party, as an equitable

defense in actions upon sealed instruments, to show a failure to receive the consideration contracted for, where an actual valuable consideration was intended to pass, and furnished the motive for entering into the contract. Candor's Appeal, 27 Pa. St. 119; Yard v. Patton, supra. But whatever the rule as to equitable defenses and counter-claims under our system of practice may properly be held to be in the case of sealed instruments, it has no application, we think, to a case like this, where full effect must be given to the seal. Under the civil law the rule is that a party making an offer, and granting time to another in which to accept it, is not at liberty to withdraw it within the appointed time, it being deemed inequitable to disappoint expectations raised by such offer, and leave the party without remedy. The common law, as we have seen, though requiring a consideration, is satisfied with the evidence thereof signified by a seal. Boston & M. R. R. v. Bartlett, supra. The same principle applies to a release under seal, which is conclusive though disclosing on its face a consideration otherwise insufficient. Staples v. Wellington, 62 Me. 9; Wing v. Chase, 35 Me. 260.

These considerations are decisive of the case, and the order denying a new trial must be reversed.

d. Must the revocation be communicated?

COLEMAN v. APPLEGARTH.

68 MARYLAND, 21. -- 1887.

ALVEY, C. J. Coleman, the appellant, filed his bill against Applegarth and Bradley, the appellees, for a specific performance of what is alleged to be a contract made by Applegarth with Coleman for the sale of a lot of ground in the city of Baltimore. The contract upon which the application is made, and which is sought to be specifically enforced, reads thus:

"For and in consideration of the sum of five dollars paid me, I do hereby give to Charles Coleman the option of purchasing my lot of ground, northwest corner, etc., assigned to me by Wright and McDermot, by deed dated, etc., subject to the ground rent therein mentioned, at and for the sum of \$645 cash, at any time on or before the first day of November, 1886."

It was dated the 3d of September, 1886, and signed by Applegarth alone.

The plaintiff, Coleman, did not exercise his option to purchase within the time specified in the contract; but he alleges in his bill that Applegarth, after making the contract of the 3d of September, 1886, and before the expiration of the time limited for the exercise of the option, verbally agreed with the plaintiff to extend the time for the exercise of such option to the 1st of December, 1886. It is further alleged that, about the 9th of November, 1886, without notice to the plaintiff, Applegarth sold, and assigned by deed, the lot of ground to Bradley, for the consideration of \$700; and that subsequently, but prior to the 1st of December, 1886, the plaintiff tendered to Applegarth, in lawful money, the sum of \$645, and demanded a deed of assignment of the lot of ground, but which was refused. It is also charged that Bradley had notice of the optional right of the plaintiff at the time of taking the deed of assignment from Applegarth, and that such deed was made in fraud of the rights of the plaintiff under the contract of September 3, 1886. The relief prayed is, that the deed to Bradley may be declared void, and that Applegarth may be decreed to convey the lot of ground to the plaintiff upon payment by the latter of the \$645, and for general relief.

The defendants, both Applegarth and Bradley, by their answers, deny that there was any binding contract, or optional right existing in regard to the sale of the lot, as between Applegarth and the plaintiff, at the time of the sale and transfer of the lot to Bradley; and the latter denies all notice of the alleged agreement for the extension of time for the exercise of the option by the plaintiff; and both defendants rely upon the statute of frauds as a defense to the relief prayed.

The plaintiff was examined as a witness in his own behalf and he also called and examined both of the defendants as witnesses in support of the allegation of his bill. But without special reference to the proof taken, the questions that are decisive of the case may be determined upon the facts as alleged by the bill alone, in connection with the contract exhibited, as upon demurrer; such facts being considered in reference to the grounds of defense interposed by the defendants.

The contract set up is not one of sale and purchase, but simply for the option to purchase within a specified time, and for a given price. It was unilateral and binding upon one party only. There was no mutuality in it, and it was binding upon Applegarth only for the time stipulated for the exercise of the option. After the lapse of the time given, there was nothing to bind him to accept the price and convey the property; and the fact that this unilateral agreement was reduced to writing added nothing to give it force or operative effect beyond the time therein limited for the exercise of the option by the plaintiff. It is quite true, as contended by the plaintiff, that, as a general proposition, time is not deemed by courts of equity as being of the essence of contracts; and that, in perfected contracts, ordinarily, the fact that the time for performance has passed will not be regarded as a reason for withholding specific execution. But while this is the general rule upon the subject, that general rule has well-defined exceptions, which are as constantly recognized as the general rule itself. If the parties have, as in this case, expressly treated time as of the essence of the agreement, or if it necessarily follows from the nature and circumstances of the agreement that it should be so regarded, courts of equity will not lend their aid to enforce specifically the agreement, regardless of the limitation of time. 2 Story's Eq. Jur. sec. 776. Here, time was of the very essence of the agreement, the nominal consideration being paid to the owner for holding the property for the specified time, subject to the right of the plaintiff to exercise his option whether he would buy it or not. When the time limited expired, the contract was at an end, and the right of option gone, if that right has not been extended by some valid binding agreement that can be enforced. This would seem to be the plain dictate of reason, upon the terms and nature of the contract itself; and that is the plain result of the decision of this court, made in respect to an optional contract to purchase, in the case of Maughlin v. Perry, 35 Md. 352, 359, 360.

As must be observed, it is not alleged or pretended that the plaintiff attempted to exercise his option, and to complete a contract of purchase, within the time limited by the written agreement of the 3d of September, 1886. But it is alleged and shown

that before the expiration of such time, the defendant Applegarth verbally agreed or promised to extend the time for the exercise of the option by the plaintiff from the 1st of November to the 1st of December, 1886; and that it was within this latter or extended period and after the property had been sold and conveyed to Bradley, that the plaintiff proffered himself ready to accept the property and pay the price therefor. It is quite clear, however, that such offer to accept the property came too There was no consideration for the verbal promise or agreement to extend the time, and such promise was a mere nudum pactum, and therefore not enforceable to say nothing of the statute of frauds, which has been invoked by the defendants. After the 1st of November, 1886, the verbal agreement of Applegarth operated simply as a mere continuing offer at the price previously fixed, and which offer only continued until it should be withdrawn or otherwise ended by some act of his; but he was entirely at liberty at any time, before acceptance, to withdraw the offer; and the subsequent sale and transfer of the property to Bradley had the effect at once of terminating the offer to the Pomeroy on Specific Performance, secs. 60, 61.

The principles that govern in cases like the present are very fully and clearly stated by the English court of appeal in chancery in the case of Dickinson v. Dodds, 2 Ch. Div. 463. case, in several of its features, is not unlike the present. the owner of property signed a document which purported to be an agreement to sell it at a fixed price, but added a postscript, which he also signed, in these words: "This offer to be left over until Friday, nine o'clock, A.M.," two days from the date of the agreement. Upon application of the party, who claimed to be vendee of the property, for specific performance, it was held, upon full and careful consideration by the court of appeal, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. In the course of his judgment, after declaring the written document to be nothing more than an offer to sell at a fixed price, Lord Justice James said:

"There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property nnsold until nine o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until nine o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear, settled law, on one of the clearest principles of law, that this promise being a mere nudum pactum, was not binding, and that at any moment before complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. That being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer.' It appears to me that there is neither principle or authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing."

And Lord Justice Mellish was quite as explicit in stating his judgment, in the course of which he said:

"He was not in point of law bound to hold the offer over until nine o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew it, but I will assume that he did) that Dodds made the offer to Dickinson, and had given him until Friday morning at nine o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds."

And further on he says:

"If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere nudum pactum, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same

effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when one of the persons to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer; and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson."

In this case, the plaintiff admits that, at the time he proffered to Applegarth acceptance of the previous offer to sell at the price named, he was aware of the fact that the property had been sold to Bradley. It was therefore too late for him to attempt to accept the offer, and there was not, and could not be made by such proffered acceptance, any binding contract of sale of the property.

It follows that the decree of the court below, dismissing the bill of the plaintiff, must be affirmed.

Decree affirmed.1

- § 7. An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.
 - (i.) Accidental compliance with terms of offer.

FITCH v. SNEDAKER.

38 NEW YORK, 248. - 1868.

WOODRUFF, J. On the 14th of October, 1859, the defendant caused a notice to be published, offering a reward of two hundred dollars . . . "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder of" a certain unknown female.

On the 15th day of October, before the plaintiffs had seen or heard of the offer of this reward, one Fee was arrested and put in jail, and though not in terms so stated, the case warrants the inference, that, by means of the evidence given by the plaintiffs

¹ See also Boston & Maine R. v. Bartlett, 3 Cush. 224; Houghwout v. Boisaubin, 18 N. J. Eq. 318; Sherley v. Peehl (Wis.), 54 N. W. R. 267.

on his trial and their efforts to procure testimony, Fee was convicted.

This action is brought to recover the reward so offered. On the trial the plaintiffs proved the publication of the notice, and then proposed to prove that they gave information before the notice was known to them, which led to the arrest of Fee. This evidence was excluded. The plaintiffs then offered to prove, that, with a view to this reward, they spent time and money, made disclosures to the district attorney, to the grand jury and to the court on the trial after Fee was in jail, and that, without their effort, evidence, and exertion, no indictment or conviction could have been had. This evidence was excluded.

The court thereupon directed a nonsuit.

It is entirely clear that, in order to entitle any person to the reward offered in this case, he must give such information as shall lead to both apprehension and conviction. That is, both must happen, and happen as a consequence of the information given. No person could claim the reward whose information caused the apprehension, until conviction followed; both are conditions precedent. No one could therefore claim the reward, who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and, however clear, that, had the information been concealed or suppressed, there could have been no conviction. This is according to the plain terms of the offer of the reward, and is held in Jones v. The Phænix Bank, 8 N. Y. 228; Thatcher v. England, 3 Com. Bench, 254.

In the last case it was distinctly held, that, under an offer of reward, payable "on recovery of property stolen and conviction of the offender," a person who was active in arresting the thief and finding and restoring part of the stolen property, giving information to the magistrates, tracing to London other of the property and producing pawnbrokers with whom the prisoner had pledged it, and who incurred much trouble and expense in bringing together witnesses for the prosecution, was not entitled to the reward, as it appeared that another person gave the first information as to the party committing the robbery.

In the present case, the plaintiff, after the advertisement of

the defendant's offer of a reward came to his knowledge, did nothing toward procuring the arrest, nor which led thereto, for at that time Fee had already been arrested.

The cases above referred to, therefore, establish that, if no information came from the plaintiffs which led to the arrest of Fee, the plaintiffs are not entitled to recover, however much the information they subsequently gave, and the efforts they made to procure evidence, may have contributed to or even have caused his conviction, and, therefore, evidence that it was their efforts and information which led to his conviction was wholly immaterial, if they did not prove that they had given information which led to his apprehension, and was properly rejected.

The question in this case is simple. A murderer having been arrested and imprisoned in consequence of information given by the plaintiff before he is aware that a reward is offered for such apprehension, is he entitled to claim the reward in case conviction follows?

The ruling on the trial, excluding all evidence of information given by the plaintiffs before they heard of this reward, necessarily answers this question in the negative.

The case of Williams v. Carwardine (4 Barn. & Adol. 621), and same case at the assizes (5 Carr. & Payne, 566), holds that a person who gives information according to the terms of an offered reward is entitled to the money, although it distinctly appeared that the informer had suppressed the information for five months, and was led to inform, not by the promised reward, but by other motives. The court said the plaintiff had proved performance of the condition upon which the money was payable and that established her title. That the court would not look into her motives. It does not appear by the reports of this case whether or not the plaintiff had ever seen the notice or handbill posted by the defendant, offering the reward; it does not, therefore, reach the precise point involved in the present appeal.

I perceive, however, no reason for applying to an offer of reward for the apprehension of a criminal any other rules than are applicable to any other offer by one, accepted or acted upon by another, and so relied upon as constituting a contract.

The form of action in all such cases is assumpsit. The defend-

ant is proceeded against as upon his contract to pay, and the first question is, was there a contract between the parties?

To the existence of a contract there must be mutual assent, or in another form offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard? On the 15th day of October, 1859, the murderer, Fee, had, in consequence of information given by the plaintiffs, been apprehended and lodged in jail. But the plaintiffs did not, in giving that information, manifest any assent to the defendant's offer, nor act in any sense in reliance thereon, they did not know of its existence. The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the plaintiffs after they heard of it. It was prospective to those who will, in the future, give information, etc.

An offer cannot become a contract unless acted upon or assented to.

Such is the elementary rule in defining what is essential to a contract. Chitty on Con. (5th Am. ed.), Perkins' notes, p. 10, 9, and 2, and cases cited. Nothing was here done to procure or lead to Fee's apprehension in view of this reward. Indeed, if we were at liberty to look at the evidence on the first trial, it would appear that Fee was arrested before the defendant offered the reward.

I think the evidence was properly excluded and the nonsuit necessarily followed.

The judgment should be affirmed.

Judgment affirmed.1

DAWKINS v. SAPPINGTON.

26 INDIANA, 199. - 1866.

FRAZER, J. The appellant was the plaintiff below. The complaint was in two paragraphs. 1. That a horse of the defendant

 1 Accord: Howland v. Lounds, 51 N.Y. 604; Stamper v. Temple, 6 Humph. (Tenn.) 113.

had been stolen, whereupon he published a handbill, offering a reward of \$50 for the recovery of the stolen property, and that thereupon the plaintiff rescued the horse from the thief and restored him to the defendant, who refused to pay the reward. 2. That the horse of the defendant was stolen, whereupon the plaintiff recovered and returned him to the defendant, who, in consideration thereof, promised to pay \$50 to the plaintiff, which he has failed and refused to do.

To the second paragraph a demurrer was sustained. To the first an answer was filed, the second paragraph of which alleged that the plaintiff, when he rescued the horse and returned him to the defendant, had no knowledge of the offering of the reward. The third paragraph averred that the handbill offering the reward was not published until after the rescue of the horse and his delivery to the defendant. The plaintiff unsuccessfully demurred to each of these paragraphs, and refusing to reply the defendant had judgment.

- 1. Was the second paragraph of the complaint sufficient? The consideration alleged to support the promise was a voluntary service rendered for the defendant without request, and it is not shown to have been of any value. A request should have been alleged. This was necessary at common law, even in common count for work and labor (Chitty's Pl. 338), though it was not always necessary to prove an express request, as it would sometimes be implied from the circumstances exhibited by the evidence.
- 2. It is entirely unnecessary, as to the third paragraph of the answer, to say more than that, though it was highly improbable in fact, it was sufficient in law.
- 3. The second paragraph of the answer shows a performance of the service without the knowledge that the reward had been offered. The offer, therefore, did not induce the plaintiff to act. The liability to pay a reward offered seems to rest, in some cases, upon an anomalous doctrine, constituting an exception to the general rule. In Williams v. Carwardine (4 Barn. & Adolph. 621) there was a special finding, with a general verdict for the plaintiff, that the information for which the reward was offered was not induced to be given by the offer, yet it was held by all

the judges of the King's Bench then present, Denman, C. J., and Littledale, Parke, and Patteson, JJ., that the plaintiff was entitled to judgment. It was put upon the ground that the offer was a general promise to any person who would give the information sought; that the plaintiff, having given the information, was within the terms of the offer, and that the court could not go into the plaintiff's motives. This decision has not, we believe, been seriously questioned, and its reasoning is conclusive against the sufficiency of the defense under examination. There are some considerations of morality and public policy which strongly tend to support the judgment in the case cited. If the offer was made in good faith, why should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it? Is it not well that any one who has an opportunity to prevent the success of a crime, may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to sustain the demurrer to the second paragraph of the answer.¹

(ii.) Offer distinguished from invitation to treat.

MOULTON v. KERSHAW.

59 WISCONSIN, 316. - 1884.

Action for damages for non-performance of a contract alleged to be contained in the following correspondence:

"MILWAUKEE, September 19, 1882.

"J. H. MOULTON, Esq., La Crosse, Wis.

"Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car-load lots of eighty to

¹ Accord: Auditor v. Ballard, 9 Bush. (Ky.) 572; Russell v. Stewart, 44 Vt. 170.

ninety-five bbls., delivered at your city, at 85 cents per bbl., to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

"Yours truly,

"C. J. KERSHAW & SON."

"LA CROSSE, September 20, 1882.

"To C. J. Kershaw & Son, Milwaukee, Wis.: Your letter of yesterday received and noted. You may ship me two thousand (2000) barrels Michigan fine salt, as offered in your letter. Answer.

"J. H. MOULTON."

Taylor, J. The only question presented is whether the appellant's letter, and the telegram sent by respondent in reply thereto, constitute a contract for the sale of 2000 barrels of Michigan fine salt by the appellants to the respondent, at the price named in such letter.

We are very clear that no contract was perfected by the order telegraphed by the respondent in answer to appellant's letter. The learned counsel for the respondent clearly appreciated the necessity of putting a construction upon the letter which is not apparent on its face, and in their complaint have interpreted the letter to mean that the appellants, by said letter, made an express offer to sell the respondent, on the terms stated, such reasonable amount of salt as he might order, and as the appellants might reasonably expect him to order, in response thereto. If in order to entitle the plaintiff to recover in this action it is necessary to prove these allegations, then it seems clear to us that the writings between the parties do not show the contract. It is not insisted by the learned counsel for the respondent that any recovery can be had unless a proper construction of the letter and telegram constitute a binding contract between the parties. The alleged contract being for the sale and delivery of personal property of a value exceeding \$50, is void by the statute of frauds, unless in writing. § 2308 R. S. 1878.

The counsel for the respondent claims that the letter of the appellants is an offer to sell to the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one car-load. On the other

hand, the counsel for the appellants claim that the letter is not an offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom he desired to trade, soliciting their patronage. To give the letter of the appellants the construction claimed for it by the learned counsel for the respondent, would introduce such an element of uncertainty into the contract as would necessarily render its enforcement a matter of difficulty, and in every case the jury trying the case would be called upon to determine whether the quantity ordered was such as the appellants might reasonably expect from the party. This question would necessarily involve an inquiry into the nature and extent of the business of the person to whom the letter was addressed, as well as to the extent of the business of the appellants. So that it would be a question of fact for the jury in each case to determine whether there was a binding contract between the parties. this question would not in any way depend upon the language used in the written contract, but upon the proofs to be made outside of the writings. As the only communications between the parties upon which a contract can be predicated are the letter and the reply of the respondent, we must look to them and nothing else, in order to determine whether there was a contract in fact. We are not at liberty to help out the written contract, if there be one, by adding by parol evidence additional facts to help out the writing, so as to make out a contract not expressed therein. If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity, at the option of the respondent, not less than one car-load. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell such a quantity as the appellants, from their knowledge of the business of the respondent, might reasonably expect him to order.

Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to construe the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the price named,

and requesting the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction of Justice Foster in the opinion in Lyman v. Robinson (14 Allen, 254): "That care should always be taken not to construe as an agreement, letters which the parties intended only as preliminary negotiations."

We do not wish to be understood as holding that a party may not be bound by an offer to sell personal property, where the amount or quantity is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amount or quantity fixed before the offer is withdrawn. We simply hold that the letter of the appellants in this case was not such an offer. the letter had said to the respondent, we will sell you all the Michigan fine salt you will order, at the price and on the terms named, then it is undoubtedly the law that the appellants would have been bound to deliver any reasonable amount the respondent might have ordered, -- possibly any amount, -- or make good their default in damages. The case cited by the counsel, decided by the California Supreme Court (Keller v. Ybarru, 3 Cal. 147), was an offer of this kind with an additional limitation. defendant in that case had a crop of growing grapes, and he offered to pick from the vines and deliver to the plaintiff, at defendant's vineyard, so many grapes then growing in said vineyard as the plaintiff should wish to take during the present year, at ten cents per pound on delivery. The plaintiff, within the time and before the offer was withdrawn, notified the defendant that he wished to take 1900 pounds of his grapes on the terms The court held there was a contract to deliver the 1900 pounds. In this case, the fixing of the quantity was left to the person to whom the offer was made, but the amount which the defendant offered, beyond which he could not be bound, was also fixed by the amount of grapes he might have in his vineyard in that year. The case is quite different in its facts from the case at bar.

The cases cited by the learned counsel for the appellants (Beaupré v. P. & A. Tel. Co., 21 Minn. 155, and Kinghorne v. Montreal Tel. Co., U. C. 18 Q. B. 60) are nearer in their main facts to the case at bar, and in both it was held there was no

contract. We, however, place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word "sell" is not used. They say, "We are authorized to offer Michigan fine salt," etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, we offer to sell to you. They use the general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement, or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they are to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.

By the Court. The order of the Circuit Court is reversed and the cause remanded for further proceedings according to law.

§ 8. The offer must be intended to create, and capable of creating, legal relations.

KELLER v. HOLDERMAN.

11 MICHIGAN, 248. — 1863.

Action on a three-hundred-dollar check which had been drawn by defendant in favor of plaintiff, on a bank which had refused to honor it. The facts concerning the check were, that it was given for a fifteen-dollar watch, which defendant kept until the day of trial, when he offered to return it, but plaintiff refused to receive it; that the whole transaction was a frolic and banter, the plaintiff not expecting to sell nor the defendant intending to buy the watch at the sum for which the check was drawn; and that the defendant when he drew the check had no money in the banker's hands, and had intended to insert a condition in the

check that would prevent his being liable upon it, but had failed to do so. Judgment was rendered against him for the amount of the check, whereupon he appealed.

Martin, C. J. When the court below found as a fact that "the whole transaction between parties was a frolic and a banter, the plaintiff not expecting to sell nor the defendant intending to buy the watch at the sum for which the check was drawn," the conclusion should have been that no contract was ever made by the parties, and the finding should have been that no cause of action existed upon the check to the plaintiff.

The judgment is reversed, with costs of this court and of the court below.

The other Justices concurred.

McCLURG v. TERRY.

21 NEW JERSEY EQUITY, 225. -- 1870.

THE CHANCELLOR: The complainant seeks to have the ceremony of marriage performed between herself and the defendant in November, 1869, declared to be a nullity. The ground on which she asks this decree is, that although the ceremony was actually performed, and by a justice of the peace of the county, it was only in jest, and not intended to be a contract of marriage, and that it was so understood at the time by both parties, and the other persons present; and that both parties have ever since so considered and treated it, and have never lived together, or acted towards each other as man and wife. The bill and answer both state these as the facts of the case, and that neither party intended it as a marriage, or was willing to take the other as husband or wife. These statements are corroborated by the witnesses present. The complainant is an infant of nineteen years, and had returned late in the evening to Jersey City, from an excursion with the defendant and a number of young friends, among whom was a justice of the peace, and all being in good spirits, excited by the excursion, she in jest challenged the defendant to be married to her on the spot; he in the same spirit accepted the challenge, and the justice at their request performed the ceremony, they making the proper responses. The ceremony was in the usual and proper form, the justice doubting whether it was in earnest or in jest. The defendant escorted the complainant to her home, and left her there as usual on occasions of such excursions; both acted and treated the matter as if no ceremony had taken place. After some time the friends of the complainant having heard of the ceremony, and that it had been formally and properly performed before the proper magistrate, raised the question and entertained doubts whether it was not a legal marriage; and the justice meditated returning a certificate of the marriage to be recorded before the proper officer. The bill seeks to have the marriage declared a nullity, and to restrain the justice from certifying it for record.

Mere words without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage. On this part of the case I have no difficulty.

I am satisfied that this court has the power, and that this is a

proper case to declare this marriage a nullity.

SHERMAN v. KITSMILLER, ADM'R.

17 SERGEANT AND RAWLE (PENN.), 45. — 1827.

[Reported herein at p. 157.]

- § 9. Acceptance must be absolute and identical with the terms of the offer.
- MINNEAPOLIS AND ST. LOUIS RAILWAY v.
 COLUMBUS ROLLING MILL.

119 UNITED STATES, 149. - 1886.

MR. JUSTICE GRAY. The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. Eliason v. Henshaw, 4 Wheat. 225; Carr v. Duval, 14 Pet. 77; National Bank v. Hall, 101 U. S. 43, 50; Hyde v. Wrench, 3 Beavan, 334; Fox v. Turner, 1 Bradwell, 153. If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made. Boston & Maine Railroad v. Bartlett, 3 Cush. 224; Dickinson v. Dodds, 2 Ch. D. 463.

The defendant, by the letter of December 8, offered to sell to the plaintiff two thousand to five thousand tons of iron rails on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than two thousand nor more than five thousand, on the terms speci-

The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20. Instead of accepting the offer made, the plaintiff, on December 16, by telegram and letter, referring to the defendant's letter of December 8, directed the defendant to enter an order for twelve hundred tons on the same terms. The mention, in both telegram and letter, of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18, the defendant by telegram declined to fulfill the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer. plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant.

Such being the legal effect of what passed in writing between the parties, it is unnecessary to consider whether, upon a fair interpretation of the instructions of the court, the question whether the plaintiff's telegram and letter of December 16 constituted a rejection of the defendant's offer of December 8 was ruled in favor of the defendant as matter of law, or was submitted to the jury as a question of fact. The submission of a question of law to the jury is no ground of exception if they decide it aright. *Pence* v. *Langdon*, 99 U. S. 578.

Judgment affirmed.1

¹See also Maclay v. Harvey, 90 Ill. 525, ante, p. 41, 44, 45; Fitch v. Snedaker, 38 N. Y. 248, ante, p. 63.

CHAPTER II.

FORM AND CONSIDERATION.

§ 1. Contracts of record.

O'BRIEN, late sheriff, v. YOUNG et al.

95 NEW YORK, 428. - 1884.

Appeal from order of the General Term of the Supreme Court, in the first judicial department, made January 8, 1884, which affirmed an order of Special Term, denying a motion to restrain the sheriff of the county of New York from collecting, upon a judgment issued to him herein, interest at a greater rate than six per cent after January 1, 1880.

Judgment was perfected against the defendants February 10, 1877, at which time the legal rate of interest in the State was seven per cent. By Chap. 538 of the laws of 1879 the legal rate of interest was reduced from seven to six per cent, the act to go into effect January 1, 1880. Execution on the judgment was issued to the sheriff November 19, 1883, instructing him to collect the amount thereof with interest at the rate of seven per cent from the date of the entry of judgment, February 10, 1877.

Earl, J. By the decided weight of authority in this State, where one contracts to pay a principal sum at a certain future time with interest, the interest prior to the maturity of the contract is payable by virtue of the contract, and thereafter as damages for the breach of the contract. *Macomber v. Dunham*, 8 Wend. 550; *United States Bank v. Chapin*, 9 Id. 471; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 Id. 586; *Southern Central R. R. Co. v. Town of Moravia*, 61 Barb. 180. And such is the rule as laid down by the Federal Supreme Court. *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Burnhisel v. Firman*, 22 Wall. 170; *Holden v. Trust Co.*, 100 U. S. 72.

The same authorities show that after the maturity of such a contract, the interest is to be computed as damages according to the rate prescribed by the law, and not according to that prescribed in the contract if that be more or less.

But when the contract provides that the interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until payment of the principal or until the contract is merged in a judgment. And where one contracts to pay money on demand "with interest," or to pay money generally "with interest," without specifying time of payment, the statutory rate then existing becomes the contract rate, and must govern until payment or at least until demand and actual default, as the parties must have so intended. Paine v. Caswell, 68 Me. 80; 28 Am. Rep. 21; Eaton v. Boissonnault, 67 Me. 540; 24 Am. Rep. 52.

If, therefore, this judgment, the amount of which is by its terms payable with interest, is to be treated as a contract—as a bond executed by the defendants at its date—then the statutory rate of interest existing at the date of the rendition of the judgment is to be treated as part of the contract and must be paid by the defendants according to the terms of the contract, and thus the plaintiff's contention is well founded.

But is a judgment, properly speaking, for the purposes now in hand, a contract? I think not. The most important elements of a contract are wanting. There is no aggregatio mentium. defendant has not voluntarily assented. All the authorities assert that the existence of parties legally capable of contracting is essential to every contract, and yet they nearly all agree that judgments entered against lunatics and others incapable in law of contracting are conclusively binding until vacated or reversed. In Wyman v. Mitchell (1 Cowen, 316), Sutherland, J., said that "a judgment is in no sense a contract or agreement between the parties." In McCoun v. The New York Central and Hudson River Railroad Company (50 N. Y. 176), Allen, J., said that "a statute liability wants all the elements of a contract, consideration and mutuality as well as the assent of the party. judgment founded upon contract is no contract." In Bidleson v. Whytel (3 Burrows, 1545-1548) it was held after great deliberation and after consultation with all the judges, Lord Mansfield speaking for the court, "that a judgment is no contract, nor can be considered in the light of a contract, for judicium redditur in invitum." To the same effect are the following authorities: Rae v. Hulbert, 17 Ill. 572; Todd v. Crumb, 5 McLean, 172; Smith v. Harrison, 33 Ala. 706; Masterson v. Gibson, 56 Id. 56; Keith v. Estill, 9 Port. 669; Larrabee v. Baldwin, 35 Cal. 156; In re Kennedy, 2 S. C. (N. S.) 226; State of Louisiana v. City of New Orleans, 109 U. S. Sup. Ct. 285.

But in some decided cases, and in text-books, judges and jurists have frequently, and, as I think, without strict accuracy, spoken of judgments as contracts. They have been classified as contracts with reference to the remedies upon them. In the division of actions into actions ex contractu and ex delicto, actions upon judgments have been assigned to the former class. It has been said that the law of contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life; that contract is co-ordinate and commensurate with duty; that whatever it is the duy of one to do he may be deemed in law to have contracted to do, and that the law presumes that every man undertakes to perform what reason and justice dictate he should perform. 1 Pars. on Cont. (6th ed.) 3; 2 Black. Com. 443; 3 Id. 160; McCoun v. N. Y. C. & H. R. R. R. Co., supra. Contracts in this wide sense are said to spring from the relations of men to each other and to the society of which they are members. Blackstone says: "It is a part of the original contract entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that State of which each individual is a member." In the wide sense thus spoken of, the contracts are mere fictions invented mainly for the purpose of giving and regulating remedies. A man ought to pay for services which he accepts, and hence the law implies a promise that he will pay for them. A man ought to support his helpless children, and hence the law implies a promise that he will do so. So one ought to pay a judgment rendered against him, or a penalty which he has by his misconduct incurred, and hence the law implies a promise that he will pay. There is no more contract to pay the judgment than there is to pay the penalty. He has neither promised to pay the one nor the other. The promise is a mere fiction, and is implied merely for the purpose of the remedy. Judgments and penalties are, in the books, in some respects, placed upon the same footing. At common law both could be sued for in an action ex contractu for debt, the action being based upon the implied promise to pay. But no one will contend that a penalty is a contract, or that one is really under a contract liability to pay it. McCoun v. N. Y. C. & H. R. R. R. Co., supra.

Suppose a statute gives a penalty to an aggrieved party, with interest, what interest could he recover? The interest allowed by law when the penalty accrued, if the statutory rate has since been altered? Clearly not. He would be entitled to the interest prescribed by law during the time of the defendant's default in payment. There would, in such a case, be no contract to pay interest, and the statutory rate of interest at the time the penalty accrued would become part of no contract. If, therefore, a subsequent law should change the rate of interest, no vested right would be interfered with, and no contract obligation would be impaired.

The same principles apply to all implied contracts. When one makes a valid agreement to pay interest at any stipulated rate, for any time, he is bound to pay it, and no legislative enactment can release him from his obligation. But in all cases where the obligation to pay interest is one merely implied by the law, or is imposed by law, and there is no contract to pay except the fictitious one which the law implies, then the rate of interest must at all times be the statutory rate. The rate existing at the time the obligation accrued did not become part of any contract, and hence the law which created the obligation could change or alter it for the future without taking away a vested right or impairing a contract.

In the case of all matured contracts which contain no provision for interest after they are past due, as I have before said, interest is allowed, not by virtue of the contract, but as damages for the breach thereof. In such cases what would be the effect of a statute declaring that no interest should be recovered? As to the interest which had accrued as damages before the date of the law, the law could have no effect because that had become a

vested right of property which could not be taken away. But the law could have effect as to the subsequent interest, and in stopping that from running would impair no contract. A law could be passed providing that in all cases of unliquidated claims which now draw no interest, interest should thereafter be allowed as damages; and thus there is ample legislative power in such cases to regulate the future rate of interest without invading any constitutional right. When a man's obligation to pay interest is simply that which the law implies, he discharges that obligation by paying what the law exacts.

This judgment, so far as pertains to the question we are now considering, can have no other or greater force than if a valid statute had been enacted requiring the defendant to pay the same sum with interest. Under such a statute, interest would be computed, not at the rate in force when the statute was enacted, but according to the rate in force during the time of default in payment. A different rule would apply if a judgment or statute should require the payment of a given sum with interest at a specified rate. Then interest at the rate specified would form part of the obligation to be discharged.

Here, then, the defendant did not in fact contract or promise to pay this judgment, or the interest thereon. The law made it his duty to pay the interest, and implied a promise that he would pay it. That duty is discharged by paying such interest as the law, during the time of default in paying the principal sum, prescribed as the legal rate.

If this judgment had been rendered at the date the execution was issued, interest would have been computed upon the original demand at seven per cent to January 1, 1880, and then at the rate of six per cent. Shall the plaintiff have a better position because the judgment was rendered prior to 1880?

As no intention can be imputed to the parties in reference to the clause in the judgment requiring payment "with interest," we may inquire what intention the court had. It is plain that it could have had no other intention than that the judgment should draw the statutory interest until payment. It cannot be presumed that the court intended that the interest should be at the rate of seven per cent if the statutory rate should become less.

That there is no contract obligation to pay the interest upon judgments which is beyond legislative interference is shown by legislation in this country and in England. Laws have been passed providing that all judgments should draw interest, and changing the rate of interest upon judgments, and such laws have been applied to judgments existing at their date, and yet it was never supposed that such laws impaired the obligation of contracts.

It is claimed that the provision in section 1 of the act of 1879, which reduced the rate of interest (Chap. 538), saves this judgment from the operation of that act. The provision is that "nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act." The answer to this claim is that here there was no contract to pay interest at any given rate. The implied contract, as I have shown, was to pay such interest as the law prescribed, and that contract is not affected or interfered with.

The foregoing was written as my opinion in the case of Prouty v. Lake Shore and Michigan Southern Railway Company. The only difference between that case and this is that there the judgment was by its terms payable "with interest." Here the judgment contains no direction as to interest. The reasoning of the opinion is applicable to this case and is, therefore, read to justify my vote in this. Since writing the opinion, we have decided, in the case of Sanders v. Lake Shore and Michigan Southern Railway Company, the law to be as laid down in the first paragraph of the opinion.

The orders of the General and Special Terms should be reversed and the motion granted, without costs in either court, the parties having so stipulated.

RUGER, C. J., and FINCH, J., concur with EARL and ANDREWS, JJ.; MILLER and DANFORTH, JJ., dissent.

Orders reversed and motion granted.1

¹ Accord: Louisiana v. Mayor, 109 U. S. 285. On recognizance, see Smith v. Collins, 42 Kans. 259.

§ 2. Contract under seal.

ALLER v. ALLER.

40 NEW JERSEY LAW, 446. - 1878.

On rule to show cause why a new trial should not be granted on verdict for the plaintiff in Hunterdon County Circuit Court.

The action was brought on the following instrument, viz.:

"One day after date, I promise to pay my daughter, Angeline H. Aller, the sum of three hundred and twelve dollars and sixty-one cents, for value received, with lawful interest from date, without defalcation or discount, as witness my hand and seal this fourth day of September, one thousand eight hundred and seventy-three. \$312.61. This note is given in lieu of one-half of the balance due the estate of Mary A. Aller, deceased, for a note given for one thousand dollars to said deceased by me. Peter H. Aller. (L. S.) Witnesses present: John J. Smith, John F. Grandin."

Scudder, J. Whether the note for \$1000 could have been enforced in equity as evidence of an indebtedness by the husband to the wife during her life, is immaterial, for after her death he was entitled, as husband of his deceased wife, to administer on her estate, and receive any balance due on the note, after deducting legal charges, under the statute of distribution. The daughters could have no legal or equitable claim on this note against their father after their mother's decease. The giving of these two sealed promises in writing to them by their father was therefore a voluntary act on his part. That it was just and meritorious to divide the amount represented by the original note between these only two surviving children of the wife, if it was her separate property, and keep it from going into the general distribution of the husband's estate among his other children, is evident, and such appears to have been his purpose.

*The question now is, whether that intention was legally and conclusively manifested, so that it cannot now be resisted.

This depends on the legal construction and effect of the instrument which was given by the father to his daughter.

It has been treated by the counsel of the defendant in his argument, as a promissory note, and the payment was resisted at the trial on the ground that it was a gift. Being a gift *inter vivos*, and without any legal consideration, it was claimed that the

action could not be maintained. But the instrument is not a promissory note, having the properties of negotiable paper by the law merchant; nor is it a simple contract, with all the latitude of inquiry into the consideration allowable in such a case; but it is in form and legal construction a deed under seal. It says in the body of the writing, "as witness, my hand and seal," and a seal is added to the name of Peter H. Aller. It is not therefore an open promise for the payment of money, which is said to be the primary requisite of a bill or promissory note, but it is closed or sealed, whereby it loses its character as a commercial instrument and becomes a specialty governed by the rules affecting common law securities. 1 Daniel's Neg. Inst., §§ 1, 31, 34.

It is not at this time necessary to state the distinction between this writing and corporation bonds and other securities which have been held to have the properties of negotiable paper by commercial usage. This is merely an individual promise "to pay my daughter, Angeline H. Aller, the sum of \$312.61, for value received," etc. It is not even transferable in form, and there is no intention shown upon its face to make it other than it is clearly expressed to be, a sealed promise to pay money to a certain person or a debt in law under seal. How then will it be affected by the evidence which was offered to show that it was a mere voluntary promise, without legal consideration, or, as it was claimed, a gift unexecuted?

Our statute concerning evidence (Rev., p. 380, § 16), which enacts that in any action upon an instrument in writing, under seal, the defendant in such action may plead and set up as a defense therein fraud in the consideration, is not applicable, for here there is no fraud shown.

But it is said that the act of April 6, 1875 (Rev., p. 387, § 52), opens it to the defense of want of sufficient consideration, as if it were a simple contract, and, that being shown, the contract becomes inoperative.

The statute reads: "That in every action upon a sealed instrument, or where a set-off is founded on a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed," etc. Suppose the presumption that the seal carries with it, that there is a sufficient consideration, is rebutted, and overcome by evidence showing there was no such consideration, the question still remains, whether an instrument under seal, without sufficient consideration, is not a good promise, and enforceable at law. It is manifest that here the parties intended and understood that there should be no consideration. The old man said: "Now here, girls, is a nice present for each of you," and so it was received by them. The mischief which the above quoted law was designed to remedy, was that where the parties intended there should be a consideration, they were prevented by the common law from showing none, if the contract was under seal. But it would be going too far to say that the statute was intended to abrogate all voluntary contracts, and to abolish all distinction between specialties and simple contracts.

It will not do to hold that every conveyance of land, or of chattels, is void by showing that no sufficient consideration passed when creditors are not affected. Nor can it be shown by authority that an executory contract, entered into intentionally and deliberately, and attested in solemn form by a seal, cannot be enforced. Both by the civil and the common law, persons were guarded against haste and imprudence in entering into voluntary agreements. The distinction between "nudum pactum" and "pactum vestitum," by the civil law, was in the formality of execution and not in the fact that in one case there was a consideration, and in the other none, though the former term, as adopted in the common law, has the signification of a contract without consideration. The latter was enforced without reference to the consideration, because of the formality of its ratification. 1 Parsons on Cont. (6th ed.) 427.

The opinion of Justice Wilmot in *Pillans* v. Van Mierop (3 Burr. 1663) is instructive on this point.

The early ease of *Sharington* v. *Strotton* (Plow. 308) gives the same cause for the adoption of the sealing and delivery of a deed. It says, among other things:

"Because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. And the reason is, because it is by words

which pass from men lightly and inconsiderately; but where the agreement is by deed, there is more time for deliberation, etc. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 Ed. IV., if I by deed promise to give you £20 to make your sale de novo, here you shall have an action of debt upon the deed, and the consideration is not examinable, for in the deed there is sufficient consideration, viz., the will of the party that made the deed."

It would seem by this old law, that in case of a deed the saying might be applied, stat pro ratione voluntas.

In Smith on Contracts, the learned author, after stating the strictness of the rules of law, that there must be a consideration to support a simple contract to guard persons against the consequences of their own imprudence, says: "The law does not absolutely prohibit them from contracting a gratuitous obligation, for they may, if they will, do so by deed."

This subject of the derivation of terms and formalities from the civil law, and of the rule adopted in the common law, is fully described in Fonb. Eq. 335, note a. The author concludes by saying: "If, however, an agreement be evidenced, by bond or other instrument, under seal, it would certainly be seriously mischievous to allow its consideration to be disputed, the common law not having pointed out any other means by which an agreement can be more solemnly authenticated. Every deed, therefore, in itself imports a consideration, though it be only the will of the maker, and therefore shall never be said to be nudum pactum." See also 1 Chitty on Cont. (11th ed.) 6; Morley v. Boothby, 3 Bing. 107; Rann v. Hughes, 7 T. R. 350, note a.

These statements of the law have been thus particularly given in the words of others, because the significance of writings under seal, and their importance in our common law system, seems in danger of being overlooked in some of our later legislation. If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality? But because deeds have been used to cover fraud and illegality in the consideration, and just defenses have been often shut out by the conclusive character of the for-

mality of sealing, we have enacted in our State the two recent statutes above quoted. The one allows fraud in the consideration of instruments under seal to be set up as defense, the other takes away the conclusive evidence of a sufficient consideration heretofore accorded to a sealed writing, and makes it only presumptive evidence. This does not reach the case of a voluntary agreement, where there was no consideration, and none intended by the parties. The statute establishes a new rule of evidence, by which the consideration of sealed instruments may be shown, but does not take from them the effect of establishing a contract expressing the intention of the parties, made with the most solemn authentication, which is not shown to be fraudulent or illegal. It could not have been in the mind of the legislature to make it impossible for parties to enter into such promises; and without a clear expression of the legislative will, not only as to the admissibility, but the effect of such evidence, such construction should not be given to this law. Even if it should be held that a consideration is required to uphold a deed, yet it might still be implied where its purpose is not within the mischief which the statute was intended to remedy. It was certainly not the intention of the legislature to abolish all distinction between simple contracts and specialties, for in the last clause of the section they say that all instruments executed with a scroll, or other device by way of scroll, shall be deemed sealed instruments. It is evident that they were to be continued with their former legal effect, except so far as they might be controlled by evidence affecting their intended consideration.

If the statute be anything more than a change of the rules of evidence which existed at the time the contract was made, and in effect makes a valuable consideration necessary, where such requisite to its validity did not exist at that time, then the law would be void in this case, because it would impair the obligation of a prior contract. This cannot be done. Cooley on Const. Lim. 288, and notes.

The rule for a new trial should be discharged.¹

¹ As to what constitutes a seal, see *Hacker's Appeal*, 121 Pa. St. 192; Cromwell v. Tate's Ex'r. 7 Leigh (Va.) 301; Solon v. Williamsburgh Sav. Bk., 114 N. Y. 122. For effect of seal on gratuitous promise, see McMillan v. Ames, 33 Minn. 257, ante, p. 54.

BENDER v. BEEN.

78 IOWA, 283.—1889.

Action upon a promissory note. A demurrer to defendant's answer was overruled, and plaintiff refusing to further plead, and standing on his demurrer, judgment was rendered for defendant. Plaintiff appeals.

Beck, J. I. The promissory note in suit was jointly executed by defendant and four others. It called for two hundred and twenty dollars, and, after certain payments were deducted, it is claimed in the petition that one hundred and fifty dollars remained due thereon, for which judgment is asked. The defendant alleged in his answer that a prior indorsee of the note, while holding it, did execute a writing, discharging defendant from all liability thereon, which is in the following words:

"MT. AYR, IOWA, 5-3, 1887.

"Received of Chas. A. Been forty dollars, and same credited on note dated March 2, 1882, given for two hundred and twenty dollars, and signed by Calvin Stiles, Wm. A. Been, J. S. Been, C. A. Been and Wm. White, given to G. Bender. The consideration of payment of above forty dollars is that said Chas. A. Been is to be released entirely from the above-named note. This is done by consent of G. Bender.

"(Signed) DAY DUNNING, Cashier."

It is further alleged in the answer that the note came into the possession of plaintiff long after maturity, who had full knowledge of the release pleaded. A demurrer to the answer was overruled, and from that decision plaintiff appeals.

II. It is a familiar rule of the law that a payment of a part of a promissory note, or of a debt existing in any different form, in discharge of the whole, will not bar recovery of the balance unpaid. The rule is based upon the principle that there is no consideration for the promise of discharge; the sum paid being in fact due from the payer on the debt, he renders no consideration to the payee for his promise to release the balance of the debt. This doctrine has been recognized in more than one decision of this court. Myers v. Byington, 34 Iowa, 205; Works v. Hershey, 35 Iowa, 340; Rea v. Owens, 37 Iowa, 262; Bryan v. Brazil, 52 Iowa, 350; Early v. Burt, 68 Iowa, 716. Under this rule the

discharge pleaded by defendant is without consideration, and is therefore void.

III. But counsel for defendant make an ingenious argument to show that the rule of the common law applicable to sealed instruments, under which they import a consideration in this State, since the abolition of private seals, is transferred to all writings which, like sealed instruments under the common law, import consideration. Without at all approving the position advocated by counsel, but regarding it as more than doubtful, it may be assumed for the purpose of showing that it cannot be applied to the case before us. It is not and cannot be claimed that a sealed instrument imports a valid consideration when it shows, by its own conditions and recitations, that it is in fact not founded upon a consideration. In other words, the presumption of consideration arising from a seal will not overcome the express language and conditions of a sealed instrument, showing that it is without consideration. We think that this proposition need only to be stated to gain assent. It does not demand in its support the citation of authorities. Attention to the release pleaded by defendant, and quoted above, discloses the fact that it shows, by positive and direct recitations, that a payment of a part of the debt was the alleged consideration of the instrument for the release of the balance of the debt. The instrument, therefore, relied upon to show the release establishes the fact that it is entirely without consideration, and cannot therefore be enforced.

It is our opinion that the District Court erred in overruling plaintiff's demurrer to defendant's answer. Its judgment is therefore reversed.

GORHAM'S ADM'R v. MEACHAM'S ADM'R.

63 VERMONT, 231. - 1891.

Bill in chancery for foreclosure of a mortgage. Heard at the September term, 1890, upon pleadings and an agreed statement of facts. Taft, Chancellor, dismissed the bill, pro forma.

TYLER, J. The following facts are reported: Rollin S. Meacham in his lifetime was administrator with the will annexed of the

estate of Angeline W. Gorham, and became largely indebted to the estate for moneys that had come into his hands as such administrator. For the purpose of securing the estate for this indebtedness, on March 1, 1889, he made and executed a promissory note for \$1550, payable to himself as administrator, on demand, and in like manner a mortgage of his home place, conditioned for the payment of the note. He never settled the estate nor rendered any account to the Probate Court. He converted the assets into money and appropriated it to his own use in his private business. At the time the note and mortgage were executed, and at his decease, he was indebted to the estate to the amount of \$7000, and was insolvent. His debts, besides what he owed the estate, amounted to about \$9000, and his assets to about \$4000. The note and mortgage were retained by him and were found after his decease in his safe among other papers that belonged to the estate, and among certain deeds and mortgages of his own. He died November 17, 1889. His wife was the daughter of the testatrix, and is the only person interested in her estate. After Meacham's decease, the defendant, as his administrator, handed the note and mortgage to Burditt, after the latter's appointment as administrator upon the estate of Mrs. Gorham, and Burditt caused the mortgage to be recorded in the town clerk's office. The question is as to its validity.

1. The mortgage must be held invalid for want of contracting parties. A contract necessarily implies a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. One person cannot by his promise confer a right against himself until the person to whom the promise is made has accepted the same. Until the concurrence of the two minds there is no contract; there is merely an offer which the promisor may at any time retract. Chitty on Cont. 9, quoting Pothier on Obligations. It is essential to the validity of a deed that there be proper parties, a person able to contract and a person able to be contracted with. 3 Wash. Real Prop. 217.

To uphold this mortgage we must say that there may be two distinct persons in one, for in law this mortgager and mortgagee are identical. The addition of the words, "executor of A. W.

Gorham's estate," does not change the legal effect of the grant, which is to Meacham in his individual capacity. In 3 Wash. 279, it is said that a grant to A, B, and C, trustees of a society named, their heirs, etc., is a grant to them individually, and Austin v. Shaw, 10 Allen, 552, Towar v. Hale, 46 Barb. 361, and Brown v. Combs, 29 N. J. L. 36, are cited. In this case the grant and the habendum are not to the estate and its legal representatives, but to Meacham, executor, his heirs and assigns. Meacham had misappropriated the funds of the estate, and no one but himself assented to his giving a note and mortgage for the purpose of partially covering his default.

2. The mortgage was not delivered. An actual manual delivery of a deed or mortgage is not necessary. If it has been so disposed of as to evince clearly the intention of the parties that it should take effect as a conveyance, it is a sufficient delivery. Orr v. Clark, 62 Vt. 136. Whether it has been so disposed of or not depends upon the facts of a given case. In Elmore v. Marks (39 Vt. 538) the orator was indebted to Marks, and for the purpose of security made and executed to him a deed of certain land and carried it to the town clerk's office to be filed but not recorded, and to be returned to him when his indebtedness to Marks should be paid. Through inadvertence the deed was recorded and the orator took it into his possession. It was never delivered to Marks and he had no knowledge of it until several months after it was recorded, when the orator told him that it had been recorded by mistake. It was held that there was no delivery. Pierpoint, C. J., said: "All authorities seem to agree that to constitute a delivery the grantor must part with the custody and control of the instrument, permanently, with the intention of having it take effect as a transfer of the title, and must part with his right to the instrument as well as with the possession. So long as he retains the control of the deed he retains the title."

Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed should presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a delivery. Byars v. Spencer, 101 Ill. 429.

In Stone v. French (1 Am. St. Rep. 237) it appeared that Francis B. French formed an intention of giving a certain piece of land to his brother unless he should dispose of it during his lifetime; accordingly he wrote a letter to his brother in which he stated that in case of his decease his brother should have the land and do with it as he pleased; that he, the grantor, would make a deed of it, inclose it in an envelope and direct it to his brother, to be mailed in event of the grantor's death. The grantor afterwards made a deed which contained the usual words, "signed, sealed, and delivered in the presence of," etc. It was in all respects properly executed and was placed in an envelope in the grantor's table drawer with directions indorsed upon the envelope to have the deed recorded, but it was in fact never delivered. held that there was no delivery of the deed and that the title to the land did not pass to the grantee; that the deed being void, the recording of it after the grantor's death gave it no validity.

A mere intention to convey a title is not sufficient. intention and the act of delivery of the deed are both essential. To constitute a complete delivery of a deed the grantor must do some act putting it beyond his power to revoke. 2 Cowen & Hill's Notes to Phillips' Ev. (5th ed.) 660, and authorities collated. In Younge v. Guilbeau (3 Wall. 636) it is said that "the delivery of a deed is essential to the transfer of a title. It is the final act without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed or the right to retain it." In Fisher v. Hall (41 N. Y. 416) the Court of Appeals said: "A rule of law, by which a voluntary deed executed by the grantor, afterward retained by him during his life in his own exclusive possession and control, never during that time made known to the grantee, and never delivered to any one for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property as to deserve no toleration whatever from any intelligent court, either of law or equity."

Without a delivery and acceptance there is no mortgage, but only an attempt at one, or a proposition to make one. 1 Jones on Morts. sec. 104; Jewett v. Preston, 27 Me. 400; Foster v. Perkins, 42 Me. 168; 3 Wash. Real Prop. 299.

The fact that the note and mortgage, duly executed by Meacham, were found after his decease among his papers and papers of the estate, shows no delivery of them in any legal sense; on the contrary, the facts that he omitted to have the mortgage recorded, that he retained it in his possession and under his control so long a time, and that it ran to him and his heirs and assigns, indicate that he never decided to give it legal effect. He did not make it operative in his lifetime, or direct that it should take effect at his death, which was necessary to give it a testamentary character. The act of recording it after that event could not give it validity.

Decree affirmed, and cause remanded.

\S 3. Simple contracts required to be in writing: Statute of Frauds.

(i.) Requirements of form.

BIRD v. MUNROE.

66 MAINE, 337. - 1877.

Assumpit. Defense, the statute of frauds. After hearing the evidence, which sufficiently appears in the opinion, the court directed that the action be made law on report to stand for trial if maintainable upon evidence legally admissible, otherwise the plaintiffs to be ronsuit.

Peters, J. On March 2, 1874, at Rockland, in this State, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered (by immediate shipments) to the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New York, put their previous verbal contract into writing, antedating it as an original contract made at Rockland on March 2, 1874. On the same day (March 24), by consent of the defendant, the plaintiffs sold the same ice to

another party, reserving their claim against the defendant for the damages sustained by them by the breach of the contract by the defendant on March 10th or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts, and prior to March 24, 1874. Several objections are set up against the plaintiffs' right to recover.

The first objection is, that in some respects the allegations in the writ and the written proof do not concur. But we pass this point, as any imperfection in the writ may, either with or without terms, be corrected by amendment hereafter.

Then it is claimed for the defendant that, as matter of fact, the parties intended to make a new and original contract as of March 24, by their writing made on that day and antedated March 2, and that it was not their purpose thereby to give expression and efficacy to any unwritten contract made by them before that time. But we think a jury would be well warranted in coming to a different conclusion. Undoubtedly there are circumstances tending to throw some doubt upon the idea that both parties understood that a contract was fully entered into on March 2, 1874, but that doubt is much more than overcome when all the written and oral evidence is considered together. We think the writing made on the 24th March, with the explanations as to its origin, is to be considered precisely as if the parties on that day had signed a paper dated of that date, certifying and admitting that they had on the 2d day of March made a verbal contract, and stating in exact written terms just what such Parol evidence is proper to show the sitverbal contract was. uation of the parties and the circumstances under which the contract was made. It explains but does not alter the terms of the The defendant himself invokes it to show that, according to his view, the paper bears an erroneous date. dence merely discloses in this case such facts as are part of the res gestæ. Benjamin on Sales, § 213; Stoops v. Smith, 100 Mass. 63, 66, and cases there cited.

Then the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first-named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only; and that there was no valid contract, such as is called for by the statute of frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d of March, and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date (March 2), although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2d or March the 24th? The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself, or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it? We incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then the requirement of the statute is in the alter-The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said, that anything given in earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then it is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterwards. It also implies that no set and formal agreement is called for. Chancellor Kent says "the instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this State, the consideration for the promise is not required to be expressed in writing. Gillighan v. Boardman, 29 Me. 79. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby and the other not be. There may be a mutuality of contract but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs; and that is, that such a construction of the statute upholds contracts according to the intention of parties thereto, while it, at the same time, fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do The object of the statute is to prevent perjury and fraud. Of course, perjury and fraud cannot be wholly prevented; but, as said by Bigelow, J. (Marsh v. Hyde, 3 Gray, 331), "a memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The locus penitentice remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from their first verbal inception. That must depend upon circumstances. In many, and perhaps most, instances such a version of the transaction would not agree with the actual understanding of the parties. In many cases, undoubtedly, the written instrument is per se the contract of the parties. In many cases, as, for instance, like the antedating of the deed in Egery v. Woodard (56 Maine, 45), cited by the defendant, the contract (by deed) could not take effect before delivery; the law forbids it. So a will made by parol is absolutely void. But all these classes of cases differ from the case before us.

A distinction is attempted to be set up between the meaning to be given to R. S. c. 111, § 4, where it is provided that no nnwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections where it provided that upon certain other kinds of unwritten contracts "no action shall be maintained;" the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded by authors generally and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all. The difference of phraseology in the different sections of the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands. Although our statute (R. S. 1871, § 4) uses the words "no contract shall be valid," our previous statutes used the phrase "shall be allowed to be good;" and the change was made when the statutes were revised in 1857, without any legislative intent to make any alteration in the sense of the section. R. S. 1841, c. 136, § 4. The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are, "shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof. Browne, St. Frauds, §§ 115, 136, and notes to the sections; Benjamin's Sales, § 114; Townsend v. Hargraves, 118 Mass. 325, and cases there cited.

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things. a state of facts involving the question would seldom exist. But we regard the case of Townsend v. Hargraves, above cited, as representing the principle very pointedly. It was there held that the statute of frauds affects the remedy only and not the validity of the contract; and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance was treated as the time when the contract was made; and the risk of the loss of the goods was cast upon the buyer. Vincent v. Germond (11 Johns. 283) is to the same effect. We are not aware of any case where the question has been directly adjudicated adversely to these cases. Zielly (52 Barb. [N. Y.] 482), in the argument of the court, directly admits the same principle. The case of Leather Cloth Co. v. Hieronimus (L. R. 10 Q. B. 140) seems also to be an authority directly in point. Thompson v. Alger (12 Met. 428, 435) and Marsh v. Hyde (3 Gray, 331), relied on by defendant, do not, in their results, oppose the idea of the above cases, although there may be some expressions in them inconsistent therewith. Altogether another question was before the court in the latter cases.

But there are a great many cases where, in construing the statute of frauds, the force and effect of the decisions go to sustain the view we take of this question, by the very strongest implication; such as, that the statute does not apply where the contract has been executed on both sides, Bucknam v. Nash, 12 Maine, 474; that no person can take advantage of the statute but the parties to the contract, and their privies, Cowan v. Adams, 10 Maine, 374; that the memorandum may be made by a broker, Hinckley v. Arey, 27 Maine, 362; or by an auctioneer, Cleaves v.

Foss, 4 Maine, 1; that a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale, Davis v. Moore, 13 Maine, 424; or several days after, Bush v. Holmes, 53 Maine, 417; or ever so long after, Browne, St. Frauds, § 337, and cases there noted; that a creditor, receiving payments from his debtor without any direction as to their application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained, Haynes v. Nice, 100 Mass. 327; that a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to the mode of procedure and not to the validity of the contract, Leroux v. Brown, 12 C.B. 801; but this case has been questioned somewhat; that a witness may be guilty of perjury who falsely swears to a fact which may not be competent evidence by the statute of frauds, but which becomes material because not objected to by the party against whom it was offered and received. Howard v. Sexton, 4 Comstock, 157; that an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterwards, Maclean v. Dunn, 4 Bing. 722; that the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed, Gale v. Nixon, 6 Cow. 445; that the recognition of the contract may be contained in a letter, or in several letters, if so connected by "written links" as to form sufficient evidence of the contract; that the letters may be addressed to a third person, Browne, St. Frauds, § 346; Fyson v. Kitton, 30 E. L. & Eq. 374; Gibson v. Holland, L. R. 1 C. P. 1; that an agent may write his own name instead of that of his principal if intending to bind his principal by it, Williams v. Bacon, 2 Gray, 387, 393, and citations there; that a proposal in writing, if accepted by the other party by parol, is a sufficient memorandum, Reuss v. Picksley, L. R. 1 Exc. 342; that where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed, Dobell v. Hutchinson, 3 A. & E. 355; that the written contract may be rescinded by parol, although many decisions are opposed to this proposition, Richardson v. Cooper, 25

Maine, 450; that equity will interfere to prevent a party making the statute an instrument of fraud, Ryan v. Dox, 34 N. Y. 307; Hassam v. Barrett, 115 Mass. 256, 258; that a contract verbally made may be maintained for certain purposes, notwithstanding the statute; that a person who pays his money under it cannot recover it back if the other side is willing to perform; and he can recover if performance is refused, Chapman v. Rich, 63 Maine, 588, and cases cited; that a respondent in equity waives the statute as a defense unless set up in plea or answer, Adams v. Patrick, 30 Vt. 516; that it must be specially pleaded in an action at law, Middlesex Co. v. Osgood, 4 Gray, 447; Lawrence v. Chase, 54 Maine, 196; that the defendant may waive the protection of the statute and admit verbal evidence and become bound by it, Browne, St. Frauds, § 135.

It may be remarked, however, that in most courts a defendant may avail himself of a defense of the statute under the general issue. The different rule in Massachusetts and Maine grew out of the practice act in the one State and in the statute requiring the filing of specifications in the other.

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol contracts, but only precludes the bringing of actions to enforce them. As said in *Thornton* v. *Kempster* (5 Taunt. 786, 788), "the statute of frauds throws a difficulty in the way of the evidence." In a case already cited, Jervis, C. J., said: "The effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." See analogous case of *McClellan* v. *McClellan*, 65 Maine, 500.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally

verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. Willes, J., perhaps correctly describes it in Gibson v. Holland, supra, when he says, "the memorandum is in some way to stand in the place of a contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." Browne, St. Frauds, § 338; Benjamin's Sales, § 159; Fricker v. Thomlinson, 1 Man. & Gr. 772; Bradford v. Spyker, 32 Ala. 134; Bill v. Bament, 9 M. & W. 36; Philbrook v. Belknap, 6 Vt. 383. In the last case it is said, "strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it."

Action to stand for trial.

Appleton, C. J., Walton, Danforth, Virgin, and Libber, JJ., concurred.¹

O'DONNELL v. LEEMAN.

43 MAINE, 158. - 1857.

MAY, J. The declaration in this case alleges a contract in writing, of a sale from the defendant to the plaintiff, of a

1 That the statute affects only executory contracts, see Finch, J., in Brown v. Farmers' Loan & Trust Co., 117 N. Y. 266, 273 (1889): "It is insisted, however, that the sale cannot stand because the contract was void under the statute of frauds. But that statute affects only executory and not executed contracts (Dodge v. Crandall, 30 N. Y. 304). It is the rule of evidence where the one party or the other is seeking performance or damages for non-performance. It has no office to perform when the contract has been executed on both sides, has been fully carried out by the parties, and requires no aid from the law."

As to whether the statute must be pleaded, the same judge in Wells v. Monihan, 129 N. Y. 161, 164 (1891), says: "So far as the defense in this case rests upon the statute of frauds, it must fail for two reasons. No such defense has been pleaded, and it is not raised by the averments of the complaint, and without one or the other of these conditions, the defense, if existing, cannot be made available. . . ." See also on this point, Crane v. Powell, 139 N. Y. 379 (1893); Hamer v. Sidway, 124 N. Y. 538, post, p. 143, 147.

See also Hunt v. Jones, 12 R. I. 265.



CHAP. II. § 3.] FORM: STATUTE OF FRAUDS.

dwelling-house at auction, upon certain specified terms and conditions. According to the contract alleged, the price to be paid was twelve hundred dollars; one-third cash down, and the residue in equal payments, in one and two years. The memorandum of sale, as contained in the auctioneer's book, is as follows:

"Oct. 9, 1855. This day sold W. H. Leeman house and land on Bartlett street, in Lewiston; was struck down to Patrick O'Donnell for \$1200, one-third cash down.

"HAM BROOKS, Auctioneer."

That the auctioneer in cases of such sales, whether of real or personal estate, is the agent of both parties, and that a memorandum signed by him at the time of the sale, stating the particulars of the contract, and the parties thereto, is a sufficient signing within the statute of frauds, is well settled. Emmerson v. Heelis, 2 Taunt. 46; McComb v. Wright, 4 John. Ch. R. 666; Chitty on Contracts, 305; Cleaves v. Foss, 4 Maine, R. 1; Alna v. Plummer, 4 Id. 258.

It is equally well settled that unless there be a memorandum showing, within itself, or by reference to some other paper, all the material conditions of the contract, no action can be maintained upon such contract, either at law or in equity. Sales at auction are now held to fall within the statute; as much so as other sales. Pike v. Balch et al., 38 Maine R. 302; Merritt v. Clason, 12 Johns. R. 102; Bailey et al. v. Ogden, 3 Johns. R. 399; Morton v. Dean, 13 Met. R. 385. And it cannot well be doubted that evasions of this statute, made as it was for the suppression of perjury, ought not to be encouraged.

The memorandum in this case contains no reference to the condition of the payment, except in the words, "one-third cash down." It does not appear from it when the residue was intended to be paid. It was attempted at the trial to show the terms of the payment to be as alleged in the writ, by the introduction of certain handbills and newspaper notices, signed by the defendant, and published by him just before the sale, and which, it is said in argument, were exhibited at the time of the sale, and in which the terms of the sale, it is said, were fully stated. The evidence offered by the plaintiff to connect the handbills and notices with

the memorandum, and to explain it, was excluded by the presiding judge.

That such extrinsic evidence was inadmissible the following authorities clearly show: 2 Parsons on Contracts, p. 298; Hinde v. Whitehouse, 7 East, 558; The First Baptist Church in Ithaca v. Bigelow, 16 Wend. 28; The Inhab. of the First Parish in Freeport v. Bartol, 3 Maine R. 340.

It is said, however, that if such evidence is not admissible, then the contract, upon its face, as stated in the memorandum, stipulates for the payment of one-third cash down, and the residue in a reasonable time; and that, if so, the notes tendered in this case, having been made payable in one and two years, should be deemed a compliance with the terms of the contract in this respect. Considering the nature and value of the estate to be conveyed, and that long credit is often if not usually given in such sales, perhaps a somewhat extended time of payment might be regarded as reasonable; but we know of no rule by which money that is made payable in a reasonable time, can, at the election of the party paying, be divided so as to make it payable at different times, and in different years. A reasonable time is indivisible; and the party to whom the money is payable, under such a contract, cannot be required to take it in separate payments, and at separate times.

The auctioneer's memorandum in this case failing to show any such contract as is alleged, so far as relates to the terms of payment, it becomes unnecessary to decide upon its sufficiency in other respects, or upon the admissibility of the other evidence offered. According to the agreement of the parties, the nonsuit must stand.

CLASON v. BAILEY.

14 JOHNSON (N. Y.), 484.—1817.

These causes came before this court on writs of error to the Supreme Court. The facts in all were, substantially, the same. See *Merritt & Merritt* v. *Clason*, 12 Johns. Rep. 102.

THE CHANCELLOR. The case struck me upon the argument as

being very plain. But as it may have appeared to other members of the court in a different, or, at least, in a more serious light, I will very briefly state the reasons why I am of opinion that the judgment of the Supreme Court ought to be affirmed.

The contract on which the controversy arises was made in the following manner:

Isaac Clason employed John Townsend to purchase a quantity of rye for him. He, in pursuance of this authority, purchased of Bailey & Voorhees 3000 bushels, at one dollar per bushel, and at the time of closing the bargain, he wrote a memorandum in his memorandum book in the presence of Bailey & Voorhees, in these words: "February 29th, bought for Isaac Clason, of Bailey & Voorhees, 3000 bushels of good merchantable rye, deliverable from the 5th to the 15th of April next, at one dollar per bushel, and payable on delivery."

The terms of the sale and purchase had been previously communicated to Clason, and approved of by him, and yet at the time of delivery he refused to accept and pay for the rye.

The objection to the contract, on the part of Clason, is that it was not a valid contract within the statute of frauds.

- 1. Because the contract was not signed by Bailey & Voorhees.
- 2. Because it was written with a lead pencil, instead of pen and ink.

I will examine each of these objections.

1. It is admitted that Clason signed this contract, by the insertion of his name by his authorized agent, in the body of the memorandum. The counsel for the plaintiff in error do not contend against the position that this was a sufficient subscription on his part. It is a point settled, that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom. Saunderson v. Jackson, 2 B. & Puller, 238; Welford v. Beazely, 3 Atk. 503; Stokes v. Moore, cited by Mr. Coxe in a note to 1 P. Wms. 771. Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing, and the names of the contracting parties appear. Clason's name was inserted in the contract by his authorized agent, and if it were admitted that the name of the other party was not there by their direction, yet the better opinion is, that Clason, the party who is sought to be charged, is estopped, by his name, from saying that the contract was not duly signed within the purview of the statute of frauds; and that it is sufficient, if the agreement be signed by the party to be charged.

It appears to me, that this is the result of the weight of authority both in the courts of law and equity.

In Ballard v. Walker (3 Johns. Cases, 60), decided in the Supreme Court, in 1802, it was held, that a contract to sell land, signed by the vendor only, and accepted by the other party, was binding on the vendor, who was the party there sought to be charged. So in Roget v. Merrit (2 Caines, 117) an agreement concerning goods signed by the seller, and accepted by the buyer, was considered a valid agreement, and binding on the party who signed it.

These were decisions here, under both branches of the statute, and the cases in the English courts are to the same effect.

In Saunderson v. Jackson (2 Bos. & Pull. 238) the suit was against the seller, for not delivering goods according to a memorandum signed by him only, and judgment was given for the plaintiff, notwithstanding the objection that this was not a sufficient note within the statute. In Champion v. Plummer (4 Bos. & Pull. 252) the suit was against the seller, who alone had signed the agreement. No objection was made that it was not signed by both parties, but the memorandum was held defective, because the name of the buyer was not mentioned at all, and consequently there was no certainty in the writing. Again, in Egerton v. Mathews (6 East, 307) the suit was on a memorandum for the purchase of goods, signed only by the defendant, who was the buyer, and it was held a good agreement within the statute. Lastly, in Allen v. Bennet (3 Taunton, 169) the seller was sued for the non-delivery of goods, in pursuance of an agreement signed by him only, and judgment was rendered for the plaintiff. In that case Ch. J. Mansfield made the observation, that "the cases of Egerton v. Mathews, Saunderson v. Jackson, and Champion v. Plummer, suppose the signature of the seller to be sufficient; and every one knows it is the daily practice of the Court of Chancery

to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can." So Lawrence, J., observed, that "the statute clearly supposes the probability of there being a signature by one person only."

If we pass from the decisions at the law to the courts of equity, we meet with the same uniform construction. Indeed, Lord Eldon has said (18 Vesey, 183) that chancery professes to follow courts of laws in the construction of the statute of frauds.

In Hatton v. Gray (2 Chan. Cas. 164; 1 Eq. Cas. Abr. 21, pl. 10) the purchaser of the land signed the agreement, and not the other party, and yet the agreement was held by Lord Keeper North to be binding on him, and this too on a bill for a specific performance. So in Coleman v. Upcot (5 Viner, 527, pl. 17) the Lord Keeper Wright held, that an agreement concerning lands was within the statute, if signed by the party to be charged, and that there was no need of its being signed by both parties, as the plaintiff, by his bill for a specific performance, had submitted to perform what was required on his part to be performed.

Lord Hardwicke repeatedly adopted the same language. In Buckhouse v. Crosby (2 Eq. Cas. Abr. 32, pl. 44) he said he had often known the objection taken, that a mutual contract in writing signed by both parties ought to appear, but that the objection had as often been overruled; and in Welford v. Beazely (3 Atk. 503) he said there were cases where writing a letter, setting forth the terms of an agreement, was held a signing within the statute; and in Owen v. Davies (1 Ves. 82) an agreement to sell land, signed by the defendant only, was held binding.

The modern cases are equally explicit. In Cotton v. Lee, before the lords commissioners, in 1770, which is cited in 2 Bro. 564, it was deemed sufficient that the party to be charged had signed the agreement. So in Seton v. Slade (7 Vesey, 275) Lord Eldon, on a bill for a specific performance against the buyer of land, said that the agreement being signed by the defendant only, made him within the statute, a party to be charged. The case of Fowle v. Freeman (9 Vesey, 351) was an express decision of the master of the rolls, on the very point that an agreement to sell lands, signed by the vendor only, was binding.

There is nothing to disturb this strong and united current of authority but the observations of Lord Ch. Redesdale, in Lawrenson v. Butler (1 Sch. & Lef. 13), who thought that the contract ought to be mutual to be binding, and that if one party could not enforce it, the other ought not. To decree performance, when one party only was bound, would "make the statute really a statute of frauds, for it would enable any person who had procured another to sign an agreement, to make it depend on his own will and pleasure whether it should be an agreement or not." The intrinsic force of this argument, the boldness with which it was applied, and the commanding weight of the very respectable character who used it, caused the courts for a time to pause. Lord Eldon, in 11 Vesey, 592, out of respect to this opinion, waived, in that case, the discussion of the point; but the courts have, on further consideration, resumed their former track. In Western v. Russell (3 Vesey & Beames, 192) the master of the rolls declared he was hardly at liberty, notwithstanding the considerable doubt thrown upon the point by Lord Redesdale, to refuse a special performance of a contract to sell land, upon the ground that there was no agreement signed by the party seeking a performance; and in Ormond v. Anderson (2 Ball & Beatty, 370) the present lord chancellor of Ireland (and whose authority, if we may judge from the ability of his decisions, is not far short of that of his predecessor) has not felt himself authorized to follow the opinion of Lord Redesdale. "I am well aware," he observes, "that a doubt has been entertained by a judge of this court, of very high authority, whether courts of equity would specifically execute an agreement where one party only was bound; but there exists no provision in the statute of frauds to prevent the execution of such an agreement." He then cites with approbation what was said by Sir J. Mansfield in Allen v. Bennet.

I have thought, and have often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce at his pleasure an agreement which the other was not entitled to claim. It appears to be settled (Hawkins v. Holmes, 1 P. Wms. 770) that though the plaintiff has signed the agree-

ment, he never can enforce it against the party who has not signed it. The remedy, therefore, in such case is not mutual. But, not-withstanding this objection, it appears from the review of the cases that the point is too well settled to be now questioned.

There is a slight variation in the statute respecting agreements concerning the sale of lands, and agreements concerning the sale of chattels, inasmuch as the one section (being the 4th section of the English, and the 11th section of our statute) speaks of the party, and the other section (being the 17th of English, and the 15th of ours) speaks of the parties to be charged. But I do not find from the cases that this variation has produced any difference in the decisions. The construction, as to the point under consideration, has been uniformly the same in both cases.

Clason, who signed the agreement, and is the party sought to be charged, is, then, according to the authorities, bound by the agreement, and he cannot set up the statute in bar. But I do not deem it absolutely necessary to place the cause on this ground, though, as the question was raised and discussed, I thought it would be useful to advert to the most material cases, and to trace the doctrine through the course of authority. In my opinion, the objection itself is not well founded in point of fact.

The names of Bailey & Voorhees are as much in the memorandum as that of Clason. The words are, "Bought for Isaac Clason, of Bailey & Voorhees, 3000 bushels," etc.; and how came their names to be inserted? Most undoubtedly they were inserted by their direction and consent, and so it appears by the special verdict. The jury find, that when the bargain was closed, Townsend, the agent of Clason, did at the time, and in their presence, write the memorandum; and if so, were not their names inserted by their consent? Was not Townsend their agent for that purpose? If they had not assented to the memorandum, they should have spoken. But they did assent, for the memorandum was made to reduce the bargain to writing in their presence at the time it was closed. It was, therefore, as much their memorandum as if they had written it themselves. Townsend was, so far, the acknowledged agent of both parties. The auctioneer who takes down the name of a buyer, when he bids. is, quoad hoc, his agent. Emmerson v. Heelis, 2 Taunt. 38. The contract was, then, in judgment of law reduced to writing, and signed by both parties; and it appears to me to be as unjust as it is illegal, for Clason or his representatives to get rid of so fair a bargain on so groundless a pretext.

2. The remaining objection is that the memorandum was made with a lead pencil.

The statute requires a writing. It does not undertake to define with what instrument, or with what material, the contract shall be written. It only requires it to be in writing, and signed, etc.; the verdict here finds that the memorandum was written, but it proceeds further, and tells us with what instrument it was written, viz., with a lead pencil. But what have we to do with the kind of instrument which the parties employed when we find all that the statute required, viz., a memorandum of the contract in writing, together with the names of the parties?

To write is to express our ideas by letters visible to the eye. The mode or manner of impressing those letters is no part of the substance or definition of writing. A pencil is an instrument with which we write without ink. The ancients understood alphabetic writing as well as we do, but it is certain that the use of paper, pen, and ink was, for a long time, unknown to them. In the days of Job they wrote upon lead with an iron pen. ancients used to write upon hard substances, as stones, metals, ivory, wood, etc., with a style or iron instrument. The next improvement was writing upon waxed tables; until at last paper and parchment were adopted, when the use of the calamus or reed was introduced. The common law has gone so far to regulate writings, as to make it necessary that a deed should be written on paper or parchment, and not on wood or stone. This was for the sake of durability and safety; and this is all the regulation that the law has prescribed. The instrument or the material by which letters were to be impressed on paper or parchment has never yet been defined. This has been left to be governed by public convenience and usage; and as far as questions have arisen on this subject, the courts have, with great latitude and liberality, left the parties to their own discretion. It has accordingly been admitted (2 Bl. Com. 297; 2 Bos. & Pull.

238; 3 Esp. Rep. 180) that printing was writing within the statute, and (2 Bro. 585) that stamping was equivalent to signing, and (8 Vesey, 175) that making a mark was subscribing within the act. I do not find any case in the courts of common law in which the very point now before us has been decided, viz., whether writing with a lead pencil was sufficient; but there are several cases in which such writings were produced, and no objection taken. The courts have impliedly admitted that writing with such an instrument, without the use of any liquid, was valid. Thus in a case in Comyn's Reports (p. 451) the counsel cited the case of Loveday v. Claridge, in 1730, where Loveday, intending to make his will, pulled a paper out of his pocket, wrote some things down with ink, and some with a pencil, and it was held a good will. But we have a more full and authentic authority in a late case decided at doctors' commons (Rymes v. Clarkson, 1 Phillim. Rep. 22.), where the very question arose on the validity of a codicil written with a pencil. It was a point over which the prerogative court had complete jurisdiction, and one objection taken to the codicil was the material with which it was written; but it was contended, on the other side, that a man might write his will with any material he pleased, quocunque modo velit, quocunque modo possit, and it was ruled by Sir John Nicholl, that a will or codicil written in pencil was valid in law.

The statute of frauds, in respect to such contracts as the one before us, did not require any formal and solemn instrument. It only required a note or memorandum, which imports an informal writing done on the spot, in the moment and hurry and tumult of commercial business. A lead pencil is generally the most accessible and convenient instrument of writing on such occasions, and I see no good reason why we should wish to put an interdict on all memoranda written with a pencil. I am persuaded it would be attended with much inconvenience, and afford more opportunities and temptation to parties to break faith with each other, than by allowing the writing with a pencil to stand. It is no doubt very much in use. The courts have frequently seen such papers before them, and have always assumed them to be valid. This is a sanction not to be disregarded.

I am, accordingly, of opinion that the judgment of the Supreme Court ought to be affirmed.

This was the opinion of the court. (Elmendorf & Livingston, senators, dissenting.)

It was thereupon ordered, adjudged, and decreed, that the judgment of the Supreme Court be, in all things, affirmed, and that the defendant recover from the plaintiffs their double costs, to be taxed, and that the record be remitted, etc.

Judgment affirmed.1



(ii.) Provisions of fourth section.

a. Special promise by an executor or administrator to answer damages out of his own estate.

BELLOWS v. SOWLES.

57 VERMONT, 164. - 1884.

Assumpsit. Heard on demurrer to the declaration. The declaration alleged that plaintiff, a relative and heir at law of defendant's testator, being left out of the will of the testator, had employed counsel, etc., to contest the will, and that defendant, being executor and himself a legatee, and the husband of the principal legatee, had also employed counsel to defend the will, and that the parties met and agreed that if plaintiff would forbear to contest the will, defendant would pay the plaintiff the sum of five thousand dollars, and that although plaintiff did forbear and the will was duly probated, defendant failed and refused to pay the amount agreed on.

Powers, J. Counsel for the defendant have demurred to the declaration in this case upon two grounds; first, that the consideration alleged is insufficient; secondly, that the promise not being in writing comes within, and is therefore not enforceable under, the statute of frauds.

It has been so often held that forbearance of a legal right affords a sufficient consideration upon which to found a valid contract, and that the consideration required by the statute of frauds does not differ from that required by the common law, it does not appear to us to be necessary to review the authorities

¹ Contra: Wilkinson v. Heavenrich, 58 Mich. 574.

or discuss the principle. As to the second point urged in behalf of the defendant, this case presents greater difficulties. Although the statute of frauds was enacted two centuries ago, and even then was little more than a re-enactment of the pre-existing common law, and though cases have continually arisen under it, both in England and America, yet so confusing and at times inconsistent are the decisions, that its consideration is always attended with difficulty and embarrassment.

The best understanding of the statute is derived from the language itself, viewed in the light of the authorities which seem to us to interpret its meaning as best to attain its object. That clause of the statute under which this case falls, reads: "No action at law or in equity shall be brought... upon a special promise of an executor or administrator to answer damages out of his own estate."

This special promise referred to is, in short, any actual promise made by an executor or administrator, in distinction from promises implied by law, which are held not within the statute.

The promise must be "to answer damages out of his own estate." This phraseology clearly implies an obligation, duty, or liability on the part of the testator's estate, for which the executor promises to pay damages out of his own estate. The statute, then, was enacted to prevent executors or administrators from being fraudulently held for the debts or liabilities of the estates upon which they were called to administer. In this view of the case, this clause of the statute is closely allied, if not identical in principle, with the following clause, namely: "No action, etc., upon a special promise to answer for the debt, default, or misdoings of another." And so Judge Royce, in delivering the opinion of the court in Harrington v. Rich (6 Vt. 666), declares these two classes of undertakings to be "very nearly allied," and considers them together. This seems to us to be the true idea of this clause of the statute: — that the undertaking contemplated by it, like that contemplated by the next clause, is in the nature of a guaranty; and that reasoning applicable to the latter is equally applicable to the former.

We believe this view to be well supported by the authorities. Browne, in his work on the Statute of Frauds, p. 150, says: "In

the fourth section of the Statute of Frauds, special promises of executors and administrators to answer damages out of their own estates appear to be spoken of as one class of that large body of contracts known as guaranties." And so on page 184, he interprets "to answer damages" as equivalent to to pay debts of the decedent. This seems to be the construction given to the statute by Chief Justice Redfield, in his work on Wills. Vol. 2, p. 290, et seq.

The Revised Statutes of New York, Vol. 2, p. 113, have improved upon the phraseology of the old statute as we have adopted it, by adding or to pay the debts of the testator or intestate out of his own estate.

If we are correct in this view of the relation between these two clauses, the solution of the question presented by this case is comparatively easy.

It has been held in this State, that when the contract is founded upon a new and distinct consideration moving between the parties, the undertaking is original and independent, and not within the statute. Templeton v. Bascom, 33 Vt. 132; Cross v. Richardson, 30 Vt. 641; Lampson v. Hobart, 28 Vt. 697. Whether or not it would be safe to announce this as a general rule of universal application, it is a principle of law well fortified by authority, that where the principal or immediate object of the promisor is not to pay the debt of another, but to subserve some purpose of his own, the promise is original and independent, and not within the statute. Brandt Sur. 72; 3 Par. Cont. 24; Rob. Fr. 232; Emerson v. Slater, 22 How. 28. And this seems to be the real ground of the decisions above cited in the 28th and 30th Vt., in which the court seems to blend the two rules just laid down.

Pierpoint, J., in delivering the opinion of the court in *Cross* v. *Richardson*, *snpra*, says: "The consideration must be not only sufficient to support the promise, but of such a nature as to take the promise out of the statute; and that requisite, we think, is to be found in the fact that it operates to the advantage of the promisor, and places him under a pecuniary obligation to the promisee, entirely independent of the original debt."

Apply this rule to this case. Here the main purpose of this promise was, not to answer damages (for the testator) out of his own estate, but was entirely to subserve some purpose of the

defendant. The consideration did not affect the estate, but was a matter purely personal to the defendant. Here there was no liability or obligation on the part of the estate to be answered for in damages. It could make no difference to the executor of that estate whether it was to be divided according to the will, or by the law of descent. If the subject matter of this contract had been something entirely foreign to this estate, no one would maintain that the defendant was not bound by it, because he happened to be named executor in this will. Here the subject matter of the contract was connected with the estate, but in such a way that it was practically immaterial to the estate which way the question was decided. There exists, therefore, in this case, no sufficient, actual, primary liability to which this promise could be collateral. This seems to us to be the fairest interpretation of the law. The statute was passed for the benefit of executors and administrators; but it might be said of it, as has been said of the protection afforded to an infant by the law of contracts, that "it is a shield to protect, not a sword to destroy." If this class of contracts was allowed to be avoided under it, instead of being a prevention of frauds, it would become a powerful instrument for fraud. As in this case the plaintiff would be deprived of his legal right to contest the will, by a party who has reaped all the benefits of the transaction, and is shielded from responsibility by a technicality. We do not believe this was the result contemplated by the statute.

The judgment of the County Court overruling the demurrer and adjudging the declaration sufficient is affirmed, and case remanded with leave to the defendant to replead on the usual terms.

b. Any promise to answer for the debt, default, or miscarriage of another.

MAY v. WILLIAMS.

61 MISSISSIPPI, 125. — 1883.

COOPER, J. It was not an error for the court below to permit an amendment to be made of the affidavit on which the writ of

seizure was issued. Louisa Williams and her infant sisters were jointly interested under the contract with Mrs. May in the fruits of their labor. In the original affidavit Louisa Williams had demanded in her own name the interest of all the laborers in the crop, and the amendment was necessary to bring before the court all the joint-owners of the claim propounded. A suit to enforce a laborer's lien is, under the Code of 1880, c. 52, a proceeding partly in rem and partly in personam. A general judgment is rendered in personam for the amount found due, and the property seized is condemned to be sold for its satisfaction. It is the amount demanded and not the value of the property seized which determines the jurisdiction of the court. Code 1880, § 1365. suits of this character the question of cost is left to the discretion of the presiding judge, and costs should be awarded in each case against the party by whom, in view of all the circumstances, it is equitable they should be borne. Code 1880, § 1369.

On the trial the defendant proposed to prove that in the spring of the year in which the crop sued for was planted, the husband of the plaintiff, Louisa Williams, was incarcerated in the jail of Noxubee County on the charge of grand larceny, and that Louisa Williams applied to her, the defendant, to become surety on his bail-bond, and verbally agreed that if the defendant would become so bound, the interest in the crop to be raised which belonged to Louisa and to her infant sisters should remain in the hands of the defendant to indemnify her against the default of the husband: that in consideration of such agreement the defendant became surety as requested; that Williams, the accused, had absconded, and that a judgment nisi had been rendered against the defendant for the sum of two hundred dollars upon the forfeited bond. Upon the objection of the plaintiffs the evidence was excluded by the court as being a parol promise to answer for the "debt or default or miscarriage of another," and, therefore, unenforceable under the statute of frauds.

There is great conflict of authority upon the question whether a parol promise to indemnify one who becomes surety for another at the request of the promisor is within that clause of the statute of frauds which declares that "no action shall be brought whereby to charge the defendant upon any special promise to answer for

the debt or default or miscarriage of another person, unless the promise or agreement upon which such action shall be brought. or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him or her thereunto lawfully authorized." In England the courts have vacillated upon the question, and the courts of this country have, to a considerable extent, taken position with that view which at the time of the several decisions prevailed in England. In Thomas v. Cook (8 B. & C. 728) a promise to indemnify was held not to be within the statute. In Green v. Cresswell (10 Ad. & E. 453) the contrary view was announced. In Cripps v. Hartnoll (4 B. & S. 414) the distinction was drawn between those cases in which the promisee was surety upon a bond by which the principal was bound to answer a criminal charge and those in which the bond was given in a civil cause, the court saying that there was no implied contract on the part of a principal who was bound over to answer a criminal charge to indemnify his surety, and, therefore, that the promise of the promisee did not come in aid of that of another person, for which reason it was decided that the promise in that case was not obnoxious to the statute. In Wildes v. Dudlow (L. R. 19 Eq. 198) Vice-Chancellor Malins treated the case of Green v. Cresswell as virtually overruled by Cripps v. Hartnoll, and in Reader v. Kingham (13 C. B. N. S. 344) it was held that a promise, to be within the statute, must be made to the promisee to pay a debt due by another to him. It may therefore be considered that in England Green v. Cresswell has been overruled, and the doctrine of Thomas v. Cook reestablished.

In this country the States of Massachusetts, Maine, New Hampshire, Georgia, Kentucky, Iowa, Indiana, Minnesota, Wisconsin, Vermont, and Connecticut have followed the authority of Thomas v. Cook, while South Carolina, North Carolina, Missouri, Alabama, and Ohio have adhered to the rule announced in Green v. Cresswell. See authorities cited in Browne on the Statute of Frauds, §§ 161–161 c; Anderson v. Spence, 72 Ind. 315. In this conflict of American authority, produced in no inconsiderable degree by the inconstancy of the English courts, the weight in numbers is in favor of the rule that such promises are not within

the statute; but an examination of the cases holding this view discloses equally as great conflict among themselves as to the principle upon which the decisions are rested. In Cripps v. Hartnoll a promise to indemnify was held not to be within the statute, because the bond was given in a criminal proceeding, and in such cases, it was said, there is no contract on the part of the person bailed to indemnify the surety. In Holmes v. Knights (10 N. H. 175) it was suggested that the principal would not be bound to indemnify the surety unless he had requested him to become bound; but, passing this question by, the decision was put upon the ground that the obligation of the principal, if it existed at all, was an implied one, and its existence would not prevent the surety from proceeding against the parol promisor, who was bound by express agreement, the court saying that if either was to be deemed collateral, the liability of the principal, in such a case, would seem to be collateral to that of the defendant. In Reader v. Kingham (13 C. B. N. S. 344), Wildes v. Dudlow (L. R. 19 Eq. 198), Aldrich v. Ames (9 Gray 76), and Anderson v. Spence (72 Ind. 315), and many other cases, the promise is held not to be within the statute, because it is said not to be made to the creditor, but to one who is debtor, while in Dunn v. West (5 B. Mon. 376) and Lucas v. Chamberlain (8 B. Mon. 276) the promise was held to be enforceable, because the implied obligation of the principal to indemnify his surety is said to arise from a subsequent fact, to wit, the payment of the debt by the surety. Upon some one or the other of these principles the cases holding this view which are most approved by the text-writers are based, though there are others in which other reasons are given, as in Read v. Nash, 1 Wils. 305; D' Wolf v. Rabaud, 1 Peters, 476; Emerson v. Slater, 22 How. U. S. 28.

Notwithstanding the number of cases in which these views are announced, we are satisfied, upon an examination of the subject, to take our stand with those courts which hold such promises to be within the statute and unenforceable, unless evidenced by writing. We do not assent to the proposition that a principal in a bailbond is not under an implied contract to indemnify his surety. He knows that the law requires some one to be bound for his appearance as a condition to his discharge from custody; he

executes the instrument by which the surety is bound, and by the bond he becomes bound as principal to that surety. By executing the bond and accepting the benefits which flow from, he assumes the duties and obligations which spring out of, his engagement, whether due to the State or to his surety. Why should a different rule be applied where one is bound to appear to answer a criminal charge than would be applicable if the thing to be done was the performance of physical labor, the proper administration of an estate, or the doing of any other act by the principal? Where the engagement is made with the knowledge and consent of the principal debtor, there is in point of law an implied request from the latter to the surety to intervene in the principal's behalf if the latter makes default, and money paid by the surety for the purpose of discharging the claim against the principal is money paid for the use of the principal at his request, which may be recovered from the latter. Exall v. Partridge, 8 T. R. 308.

It cannot be said that the promise to indemnify the surety is made to him as debtor and not as creditor. It is true that both the principal and surety are bound to the fourth person, the State; but the contract of the promisor is not to discharge that obligation. He assumes no duty or debt to the State, nor does he agree with the promisee to pay to the State the debt which may become due to it if default shall be made by the principal in the bond. It is only when the promisee has changed his relationship of debtor to the State and assumed that of creditor to his principal by paying to the State the penalty for which both he and his principal were bound that a right arises to go against the guarantor on his contract. It is to one who is under a conditional and contingent liability that the promise is made; but it is to him as creditor, and not as debtor, that a right of action arises on it. Nor do we think it sufficient to take the case from the operation of the statute that the liability of the principal arises by implication rather than by express contract. The statute makes no distinction between a debt due on an implied and one due by express contract. It is the existence of the debt against the principal, and not the manner in which it originates, that makes voidable a parol promise by another to become responsible for its payment. Nor are we able to perceive that the contract of the promisee is anterior to that of the principal in the bond. Until the surety assumes responsibility by executing the bond, the agreement of the promisor to indemnify is only a proposition which may be withdrawn by him or declined by the promisee. It is only when the proposition is acted on by the promisee that the contract becomes absolute; but at the very instant that it thus becomes a contract there also springs up an implied contract of the principal to do and perform the same act, viz., to indemnify the surety against loss. It arises at the same moment, exists to the same extent, is supported by the same consideration, broken at the same instant, and is discharged by the same act, whether it be done by the principal in the bond or by the promisee in the contract to indemnify. It is the debt of the principal; and, being his debt, no third person can be bound for its payment unless the contract be evidenced by writing. This, we think, is the fair import of the statute and it ought not to be refined or frittered away.

Judgment affirmed.1

c. Contract for sale of lands or hereditaments, or any interest in or concerning them.

HEYN v. PHILIPS.

37 CALIFORNIA, 529. - 1869.

Appeal from the District Court, Third Judicial District, Alameda County. Judgment for defendant. Plaintiff appeals.

SAWYER, C. J. The question in this case is, whether the contract sued on and proved is a contract "for the sale of any lands, or interest in lands," within the meaning of the eighth section of the statute of frauds, and which is required to be in writing, and subscribed by the party to be charged.

The contract alleged is, that defendant employed said plaintiff

¹ Contra, with review of cases, Anderson v. Spence, 72 Ind. 315. For a case that escapes the statute, where the primary debt does subsist, see White v. Rintoul, 108 N. Y. 222.

to negotiate a sale of certain described lands, and find a purchaser for the same; that it was

"stipulated and agreed by and between said defendant and said plaintiff, that if said plaintiff would and should, within ten days from said lastnamed day, find a purchaser or purchasers for said land, at the price of two hundred dollars per acre, that the said defendant would sell and convey the same for that sum to such purchaser or purchasers, and that said plaintiff might and should have for his services in making such negotiation and finding a purchaser or purchasers, all that might or could be obtained from such purchaser or purchasers over said sum of two hundred dollars per acre;"

that plaintiff found a purchaser at that sum and four thousand dollars over; that said purchaser tendered the money to defendant and demanded a conveyance, and that said defendant refused to receive said sum, or make a conveyance, whereby plaintiff was prevented from receiving the said excess of four thousand dollars as compensation for his services.

It does not appear to us that this is a contract for the sale of land, or an interest in land, within the meaning of the statute of frauds. It was a mere contract of employment between the plaintiff and defendant. There was no sale of land from the defendant to the plaintiff. The plaintiff was simply employed to find a purchaser for defendant's land at a given price to be realized by defendant, and the compensation to be received by plaintiff was to be such sum as he could get for the land over the given price. It is true that defendant agreed that in case a purchaser should be found willing to pay the given price or a larger sum, he would convey to such purchaser upon the receipt of the money so as to enable plaintiff to realize the compensation, and he did not agree to pay anything himself, but this was still but a mode of ascertaining and obtaining a compensation for plaintiff's services. The plaintiff had no interest, and was to have no interest whatever in the land, as such. The contract was substantially one of employment to find a purchaser of land, and not as between the parties a sale or agreement to sell land, or any interest in land. The subject matter of the contract was the business of finding a party who would purchase the land for a given price and such sum over as would compensate the plaintiff for his services. He found a purchaser, and he was prevented from receiving his compensation by the refusal of the defendant to enter into the contract of sale with the purchaser found by plaintiff.

We think the judgment and order denying a new trial should be reversed and a new trial had, and it is so ordered.

d. Agreement not to be performed within the space of one year from the making thereof.

PETERS v. WESTBOROUGH.

19 PICKERING (MASS.), 364.—1837.

Assumpsit for expenses incurred, etc., in the support of Catharine Ladds, from March 2, 1835, until her death.

At the trial in the Common Pleas, before Strong, J., it appeared that the plaintiff was an inhabitant of Westborough; that Catharine Ladds was the daughter of John Ladds, who resided in a neighboring town; that she came into the family of the plaintiff in March, 1834, when she was eleven or twelve years of age, and remained there until her death, which took place on the 31st of May, 1835, after a sickness of four or five months; that on the 2d of March, 1835, the plaintiff gave notice of her illness to one of the overseers of the poor of Westborough, and requested that she might be supported by the town; but that no action was taken by them on the subject.

The counsel of the defendants then proposed to show by parol evidence, that a short time before Catharine went into the plaintiff's family, it was agreed between him and her father that the plaintiff should take her into his family and employment for one month on trial, and if, at the end of the month, he was not satisfied with her, he might return her to her father, but that, otherwise, he should support her until she was eighteen years of age, and should not return her for any cause but bad conduct on her part; that, in pursuance of this agreement, she went into the family of the plaintiff, and that at the end of the month the plaintiff expressed himself to be satisfied with her, and never offered to return her to her father.

The plaintiff objected to the introduction of this evidence, on the ground that the contract not being in writing, was void by the statute of frauds.

The judge ruled, that, as this contract was by parol, it was competent for the plaintiff to put an end to it at any time, and that, after the notice given to the overseers on the 2d of March, 1835, the plaintiff ceased to be liable for the support of the pauper; and the evidence was accordingly rejected.

The jury returned a verdict for the plaintiff. The defendant excepted to the ruling of the judge.

WILDE, J. This case depends on the question, whether the plaintiff was not, by his contract, as it was offered to be proved by the defendants, bound to support the pauper for the expenses of whose support the defendants are charged; and we are of opinion that he was so bound by his contract with the pauper's This was clearly a valid contract, unless, being by parol, it was void by the statute of frauds, as an agreement not to be performed within the space of one year from the making thereof. St. 1788, c. 16, § 1. But this clause of the statute extends only to such agreements as, by the express appointment of the parties, are not to be performed within a year. If an agreement be capable of being performed within a year from the making thereof, it is not within the statute, although it be not actually performed till after that period. 1 Com. on Contr. 86. On this construction of the statute it was decided, in an anonymous case in 1 Salk. 280, that a parol promise to pay so much money upon the return of a certain ship was not within the statute, although the ship happened not to return within two years after the promise was made; for that, by possibility, the ship might have returned within a year. So, in the case of Peter v. Compton (Skin. 353) it was decided that a promise to pay money to the plaintiff on the day of his marriage was not within the statute, though the marriage did not happen within a year. And it was held by a majority of the judges, that where an agreement is to be performed upon a contingency, and it does not appear in the agreement, that it is to be performed after the year, there a note in writing is not necessary; for the contingency might happen within the year.

This construction of the statute is fully confirmed by the case of Fenton v. Emblers, 3 Burr. 1278. In that case the defendant's testator had promised the plaintiff, that if she would become his housekeeper, he would pay her wages after the rate of £6 per annum, and give her, by his last will and testament, a legacy or annuity of £16 by the year, to be paid yearly. plaintiff, on this agreement, entered into the testator's service, and became his housekeeper, and continued so for more than three years. And the contract, though by parol, was held to be valid and not within the statute, Mr. Justice Dennison declaring his opinion to be (in which opinion the other judges coincided) that the statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed, that a contingency was not within it, nor any case that depended on a contingency, and that it did not extend to cases where the thing might be performed within the year.

But if it appears clearly that an agreement is not to be performed within a year, and that such is the understanding of the parties, it is within the statute of frauds, although it might be partly performed within that period. Such was the decision in Boydell v. Drummond, 11 East, 142. But the performance of the agreement in that case did not depend on the life of either party, or any other contingency. The defendant had agreed to take and pay for a series of large prints from some of the scenes in Shakespeare's plays. The whole were to be published in numbers; and one number, at least, was to be published annually after the delivery of the first. The whole scope of the undertaking shows, as Lord Ellenborough remarks, that it was not to be performed within a year; and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year.

From these authorities it appears to be settled, that in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend on any contingency. And this, we think, is the clear meaning of the statute.

In the present case, the performance of the plaintiff's agreement with the child's father depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year.

Judgment of the Court of Common Pleas reversed, and a new trial granted.¹

(iii.) Provisions of seventeenth section.

NORTHERN et al. v. THE STATE on the Relation of LATHROP.

1 INDIANA, 113.—1848.

Perrins, J. . . . The finding of the court upon the issue on the replication to the third plea was wrong. The defendants had no property subject to execution. It is admitted they had not, unless the corn mentioned below was so. A witness, "James H. Goff, testified that, about the last of May or first of June, 1844, after the corn which David Griffin had planted on the farm of George Cheek was two or three inches high, said Griffin called and told him the weeds were about taking his corn; that he was poor and sick, and should not be able to raise his crop unless," etc. Goff then bought the corn of Griffin, paid a part of the consideration in hand, etc. The execution against Griffin, for failing to make the money on which the defendants are sued, did not issue till the August succeeding this sale, and it is not pretended there was any fraud; but it is insisted that the corn was not so in esse at the time as to be the subject of sale, and that the

¹ The case came again before the court. 20 Pick. 506.

contract was for an interest in land and within the statute requiring a memorandum in writing. The cases of Whipple v. Foot (2 John. 418), Austin v. Sawyer (9 Cow. 39), Craddock v. Riddlesbarger (2 Dana, 205), and Jones v. Flint (10 Ad. & Ell. 753), among others, decide that growing crops, raised annually, by labor, are the subject of sale as personal property, before maturity, and that their sale does not necessarily involve an interest in the realty requiring a written agreement. See also Chit. on Con. 301; 1 Hill Ab. 58. We think this case comes within those cited. No other point requires an opinion.

It is only necessary to add, that we are not satisfied, upon a full examination of this case, that the plaintiff in error was not injured by the erroneous decision of the court below, and shall, therefore, reverse the final judgment there rendered.

Per Curiam. The judgment is reversed with costs. Cause remanded, etc.

HIRTH v. GRAHAM.

OHIO STATE, \$7. − 1893.

[88 N. E. Rep. 90.]

The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber. Plaintiff had judgment before the justice of the peace which was affirmed by the Court of Common Pleas, but reversed by the Circuit Court. Error to Circuit Court.

BRADBURY, J. . . . Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several States of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject. Lord Mansfield held that the sale of a crop of growing turnips was within this clause of

the statute. Emmerson v. Heelis, 2 Taunt. 38, following the case of Waddington v. Bristow, 2 Bos. & P. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in Crosby v. Wadsworth (6 East. 602) the sale of growing grass was held to be a contract for the sale of an interest in or concerning land, Lord Ellenborough saying, "Upon the first of these questions" (whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them) "I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning, lands." Id. 610. Afterwards, in Teal v. Auty (2 Brod. & B. 99), the Court of Common Pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which have been to greatly narrow the application of the fourth section of the statute of frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation, while the sale of other crops, and in some instances growing timber also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the common pleas division of the high court of justice in Marshall v. Green (1 C. P. Div. 35), decided in 1875. The syllabus reads: "A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the fourth section of the statute of frauds." This decision was rendered by the three justices who constituted the common pleas division of the high court of justice, Coleridge, C. J., Brett and Grove, JJ., whose characters and attainments entitle it to great weight; yet, in view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benj. Sales [ed. 1892],

§ 126), it cannot be considered as finally settling the law of England on this subject. The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut, sales of growing trees to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds. Claffin v. Carpenter, 4 Metc. (Mass.) 580; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Bostwick v. Leach, 3 Day, 476; Erskine v. Plummer, 7 Me, 447; Cutler v. Pope, 13 Me, 377; Cain v. McGuire, 13 B. Mon. 340; Byassee v. Reese, 4 Metc. (Ky.) 372; Smith v. Bryan, 5 Md. 141. In none of these cases, except 4 Metc. (Ky.) 372, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited (Marshall v. Green, 1 C. P. Div. 35) the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale. cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts (Giles v. Simonds, 15 Gray, 441) holds that "the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation." The courts of most of the American States, however, that have considered the question. hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds. Green v. Armstrong, 1 Denio. 550; Bishop v. Bishop, 11 N. Y. 123; Westbrook v. Eager, 16 N. J. Law, 81; Buck v. Pickwell, 27 Vt. 157; Cool v. Lumber Co., 87 Ind. 531; Terrell v. Frazier, 79 Ind. 473; Owens v. Lewis, 46 Ind. 488; Armstrong v. Lawson, 73 Ind. 498; Jackson v. Evans.

44 Mich. 510, 7 N. W. Rep. 79; Lyle v. Shinnebarger, 17 Mo. App. 66; Howe v. Batchelder, 49 N. H. 204; Putney v. Day, 6 N. H. 430; Bowers v. Bowers, 95 Pa. St. 477; Daniels v. Bailey, 43 Wis. 566; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. Rep. 467; Knox v. Haralson, 2 Tenn. Ch. 232. The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Jones v. Timmons, 21 Ohio St. 596. petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple, and of easy application, - qualities entitled to substantial weight in choosing between conflicting principles. Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered. Judgment affirmed.

GODDARD v. BINNEY.

115 MASSACHUSETTS, 450. — 1874.

Contract to recover the price of a buggy built by plaintiff for defendant. Defense, the statute of frauds.

Defendant ordered plaintiff, a carriage manufacturer, to build him a buggy, with a drab lining, outside seat of cane, painted in a specified style, and with defendant's monogram on the sides. Defendant called on plaintiff afterward, and on being asked if he would consent that plaintiff should sell the buggy, replied no, that he would keep it. After it was finished according to directions, plaintiff sent a bill to defendant, and sent twice afterward for payment, and each time defendant promised to call and see plaintiff about it. Before the buggy was paid for or delivered, it was burned.

Verdict was directed for defendant, and it was agreed that if the court is of opinion that the buggy was on the premises of plaintiff at risk of defendant, the verdict should be set aside and judgment entered for plaintiff for \$675 and interest; otherwise, judgment on the verdict.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services, and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other States of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. Crookshank v. Burrell, 18 Johns. 58; Sewall v. Fitch, 8 Cow. 215; Robertson v. Vaughn, 5 Sandf. 1; Downs v. Ross, 23 Wend. 270; Eichelberger v. M'Cauley, 5 Har. & J. 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in Lee v. Griffin (1 B. & S. 272) goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See Maberley v. Sheppard, 10 Bing. 99; Howe v. Palmer, 3 B. & Ald. 321; Baldey v. Parker, 2 B. & C. 37; Atkinson v. Bell, 8 B. & C. 277.

In this commonwealth, a rule avoiding both of these extremes was established in *Mixer* v. *Howarth* (21 Pick. 205), and has been

recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. Spencer v. Cone, 1 Met. 283. "The distinction," says Chief Justice Shaw, in Lamb v. Crafts (12 Met. 353), "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In Gardner v. Joy (9 Met. 177) a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are Waterman v. Meigs, 4 Cush. 497, and Clark v. Nichols, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Sts. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject matter. It is proper to say also that the present case is a much stronger one than Mixer v. Howarth. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession. Dixon v. Yates, 5 B. & Ad. 313, The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the meantime. Noy's Maxims, 89; 2 Kent. Com. (12th ed.) 492; Bloxam v. Sanders, 4 B. & C. 941; Tarling v. Baxter, 6 B. & C. 360; Hinde v. Whitehouse, 7 East, 571; Macomber v. Parker, 13 Pick. 175, 183; Morse v. Sherman, 106 Mass. 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough

has been done, in a case not within that statute, to vest the general ownership in the defendant, and to east upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and judgment entered for the plaintiff.

GREENWOOD v. LAW.

55 NEW JERSEY LAW, 168.-1892.

VAN SYCKEL, J. Law, the plaintiff below, gave to Greenwood, the defendant, a mortgage upon lands in this State for the sum of \$3700. Law alleged that Greenwood entered into a parol agreement with him to assign him this mortgage for the sum of \$3000, and brought this suit to recover damages for the refusal of Greenwood to execute said parol agreement.

On the trial below, a motion was made to nonsuit the plaintiff, on the ground that the alleged agreement was within the statute of frauds. The refusal of the trial court to grant this motion is assigned for error.

Lord Chief Justice Denman, in *Humble* v. *Mitchell*, reported in 11 Ad. & E. 205, and decided in 1840, said that no case directly in point on this subject had been found, and he held that shares in an incorporated company were not goods, wares, and merchandise within the seventeenth section of the statute of frauds.

He overlooked the cases of Mussell v. Cooke, reported in Precedents in Chancery, 533 (decided in 1720), and Crull v. Dodson, reported in Select Cases in Chancery (temp. King), 41 (decided in 1725), in which the contrary view was taken.

In the case of *Pickering* v. *Appleby* (Com. 354) this question was fully argued before the twelve judges, who were equally divided upon it. The cases decided in the English courts since 1840 have followed *Humble* v. *Mitchell*. They will be found collected in *Benjamin on Sales* (ed. 1888) in a note on page 106.

In this country a different rule prevails in most of the States.

In Baldwin v. Williams (3 Metc. 365) a parol contract for the sale of a promissory note was held to be within the statute.

In Connecticut and Maine a contract for the sale of shares in a joint stock company is required to be in writing. North v. Forest, 15 Conn. 400; Pray v. Mitchell, 60 Me. 430.

Chief Justice Shaw, after a full discussion of the subject in Tisdale v. Harris (20 Pick. 9), concludes that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute of frauds, and in the absence of the other requisites of the statute must be proved by some note or memorandum in writing signed by the party to be charged or his agent. He did not regard the argument, that by necessary implication the statute applies only to goods of which part may be delivered, as worthy of much consideration. An animal is not susceptible of part delivery, yet undoubtedly the sale of a horse by parol is within the statute. The exception in the statute is, when part is delivered; but if there cannot be a delivery in part, the exception cannot exist to take the case out of the general prohibition.

Bonds and mortgages were expressly held to be goods and chattels in *Terhune* v. *Executors of Bray*, 1 Harr. 53. That was an action of trover for a bond and mortgage. Chief Justice Hornblower, in deciding the case, said that, although the attachment act and letters of administration seem to distinguish between rights and credits and goods and chattels, and although an execution against the latter will not reach bonds and notes, yet there is a sense in which upon sound legal principles such securities are goods and chattels.

This sense ought to be applied to these words in this case.

Reason and sound policy require that contracts in respect to securities for money should be subject to the reasonable restrictions provided by the statute to prevent frauds in the sale of other personal property.

The words "goods, wares, and merchandise" in the sixth section of the statute are equivalent to the term "personal property," and are intended to include whatever is not embraced by the phrase "lands, tenements, and hereditaments" in the preceding section. In my judgment, the contract sued upon is within the statute of frauds, and it was error in the court below to refuse to nonsuit.

§ 4. Consideration.

(i.) Consideration is necessary to the validity of every simple contract.

COOK v. BRADLEY.

7 CONNECTICUT, 57. - 1828.

Bill for the correction of a mistake in a discharge given by Bradley to defendant's intestate, or for an injunction against the use of the discharge in an action at law, then pending.

The action at law was on a written instrument delivered by defendant's intestate to Bradley, wherein he acknowledged himself indebted in the sum of sixty dollars to Bradley for necessaries furnished by Bradley to the father of the intestate, and promised to pay the same in case the father failed to do so. The father had since died without paying the same.

The discharge was given in settlement of an action of book debt, and by mistake was so drawn as to cover all claims and demands whatever. Bradley had demanded of the intestate the correction of the discharge, but this was refused.

On demurrer the bill was adjudged sufficient. Defendant appealed.

DAGGETT, J. The question presented on this record for discussion, arises on the validity of the promise of the deceased, Henry Cook, stated in the bill. If no action can be supported on that contract, then the interference of the court to exercise its chancery power, to explain or invalidate the discharge, would be useless; and the examination of other points suggested in argument, unnecessary. I am satisfied, on a full view of the case, that the contract is void, for want of consideration; and therefore that no action can be supported on it.

1. The contract is not a specialty, though in writing; nor is it governed by the law merchant applicable to negotiable paper. Were it of the first description, by the rules of the common law, the consideration would be locked up, and could not be inquired into. Were it a note or bill of exchange, the law merchant would give to it the same force in relation to third persons. It is true that in Pillans & Rose v. Van Mierop & Hopkins (3 Burr. 1664)

a suggestion was made by Wilmot, and the judges who sat with him in the King's Bench, that mere want of consideration could not be alleged in avoidance of a contract in writing. This suggestion was never established as law; and in the case of Rann v. Hughes (7 Term Rep. 350 n.) the true doctrine of the common law was laid down. A mere written contract is upon the footing of a parol contract, and a consideration must be proved. This is an inflexible rule of law; and the court is not at liberty, if it had the disposition, to subvert it. Ex nudo pacto non oritur actio.

2. What is a consideration sufficient to uphold a contract? Here, too, the common law furnishes the answer; a benefit to the party promising, or a loss to the party to whom the promise is made. The quantum of benefit, on the one hand, or of loss on the other, is immaterial. *Powell on Contracts*, 343, 344. To multiply authorities on this point is quite unnecessary.

Let us now apply these uncontroverted principles to the case before us. Could Henry Cook possibly receive any benefit from this contract? He gained nothing—nothing was renounced hereby. Was he induced by any loss to the promisee? He advanced nothing; he became liable for nothing; he did not forego anything, by or on the ground of it. He had before, not at the request of Henry Cook, but of Jonathan Cook, furnished the latter with necessaries for his support. It is impossible to discover, thus far, any consideration known to the law.

3. The defendant in error still insists, that the father being poor and unable to support himself, and the son being possessed of large property, a legal obligation rested on him to pay for these necessaries thus furnished; and a legal obligation is a good consideration for a promise. The conclusion is just, if the premises are true. But was there this legal obligation? If it exist, it is to be found in our statute providing for the support of paupers. Stat. 369. tit. 73, c. 1. Provision is there made, that poor and impotent persons, unable to support themselves, shall be supported by their children, if of sufficient ability. The manner in which they shall be compelled to furnish this support is prescribed. The selectmen of the town where the poor persons reside, or one or more of their relations, may make application to the county court, and the court may order such support to be

supplied, by the relations of the poor persons, from the time of such application. The facts are to be ascertained by the court. The provision is prospective only. It regards no supplies already furnished, or expenses already incurred; and the liability, the legal obligation, is precisely as extensive as the law establishes it, and no greater. By this statute, then, for these reasons, the legal obligation alleged in support of this contract does not appear.

That such is the construction of this statute, I cite the opinion of the Supreme Court of Massachusetts in Mills v. Wyman (3 Pick. Rep. 207, 212) as to a similar statute of that State; and especially I rely on the decision of this court in Wethersfield v. Montague et al., 3 Conn. Rep. 507. One of the points settled in that case was, that "no assessment could be made, by virtue of this statute, for past expenditures, the provisions of the statute being exclusively prospective." The principle then is, that there is no legal obligation to pay past expenditures; which exonerates the son in this case from all legal liability for the expenditures for the father.

4. This opens to us the only remaining point. The counsel for the defendant in error urge, that the son was under a moral obligation to support the father, that this is a sufficient consideration to uphold the promise, and that, therefore, the son is liable.

It cannot be successfully contended, that in every case where a person is under a moral obligation to do an act, as, to relieve one in distress by personal exertions, or the expenditure of money, a promise to that effect would be binding in a court of law. Such an idea is unsupported by principle or precedent. It is a just rule of morality, that a man should do towards others what he might reasonably expect from others in like circumstances. This rule is sanctioned by the highest authority, and is very comprehensive. An affectionate father, brother, or sister has taken by the hand the youngest son of the family, given him an education, and placed him in a situation to become, and he has become, affluent. The father, brother, or sister, by the visitation of Providence, has become poor, and impotent, and houseless. The son, rolling in riches, in the overflowings of his gratitude for kindness experienced, contracts in writing to discharge some

portion of the debt of gratitude, by giving to his destitute relative some one of his numerous houses for a shelter, and a thousand of his many thousand dollars for his subsistence; can such a promise be enforced in any judicial tribunal? Municipal laws will not decide what honor or gratitude ought to induce the son to do in such a case, as Dr. Blackstone remarks (2 Bla. Com. 445), but it must be left to the forum of conscience.

It cannot be denied that many distinguished judges have laid down the principle that moral obligation is alone a sufficient consideration to support a contract. Thus did Lord Mansfield, in Cowper, 288, 544. He was followed by Mr. Justice Buller, by Lord Ellenborough, and other judges in other cases. But it is an obvious remark, that the cases cited in illustration of those positions were all cases where a prior legal obligation had existed, but by reason of some statute, or stubborn rule of law, it could not be enforced: as a promise to pay a debt barred by bankruptcy, or the statute of limitations, or a promise by an adult to pay a debt contracted during minority. In all these instances a good consideration existed, for each had received a benefit.

All the cases on this subject are carefully, and with just discrimination, revised in a note in 3 Bos. & Pull. 249, and the true distinctions taken. The law of this note has been recently adopted in the Supreme Court of New York in the cases of Smith v. Ware (13 Johns. Rep. 257, 289) and Edwards et ux. v. Davis (16 Johns. Rep. 281, 283 n.), and in a still later case (in the year 1826) in Massachusetts, viz., Mills v. Wyman (3 Pick. Rep. 207) -a case referred to above for another purpose. No stronger case of moral obligation can be found. "A son who was of full age and had ceased to be a member of his father's family was suddenly taken sick among strangers, and being poor and in distress, was relieved by the plaintiff, and afterwards the father wrote to the plaintiff, promising to pay him the expenses incurred; it was held that such promise would not sustain an action." I am well satisfied with the very able and sound reasoning of the court delivered by Chief Justice Parker on that occasion.

I will now advert to the particular decisions of the English courts cited at the bar and relied on. Watson v. Turner, Bull.

Nisi Prius, 147. It is no longer doubted that the defendants in that case, the overseers of the poor, were under a legal obligation to furnish the support for which the promise was made. It is a case, therefore, within the rule in 3 Bos & Pull. 249 n. The case of Scott v. Nelson, cited Esp. Dig. 95, and an anonymous case in 2 Shower, 184, seem to imply that a father was holden liable on a promise to pay for supplies for his bastard child; but in my opinion, it may be safely inferred from the facts that the supplies were furnished on request, which would make a material difference. In Wing v. Mill (1 Barn. & Ald. 104) the whole court held that a legal and moral obligation existed. In the case of Barnes v. Hedley & Conway (2 Taunt. 184) the court held, that when the parties to usurious securities stripped them of all usury, and the securities were given up and cancelled, by agreement of the parties, and the borrower of the money promised in consideration of having received the principal, to pay the same with legal interest, the promise was binding. This case rests upon the same principles which were recognized by this court in the case of Kilborun v. Bradley (3 Day 356), where the court decided that if a usurious security be given up, and a new security be taken for the principal sum due and legal interest, the latter security will be good. This bears not at all upon the case under consideration. The money advanced was a good consideration of the promise to repay it, the usury being expunged. In the case of Lee v. Muggeridge et al., executors of Mary Muggeridge, deceased (5 Taunt. 36), it was held that a feme covert, having given a bond for money advanced to her son-in-law, at her request, was bound by a promise made by her after she became discovert. Mary, the obligor in that case, had a large estate settled to her separate use. In this condition she executed a bond for money advanced to her son-in-law, at her request. After the death of the husband, and while single, she wrote a letter promising to pay the amount thus advanced. The court, in giving their opinion, say this is a promise founded on a moral obligation, and that it is a good consideration. I should say the promise was founded on the advancement of the money, at her request, to her son-in-law, and as she was incapacitated to bind herself, by reason of the coverture, when she received the benefit, and is therefore protected

from liability by a stubborn rule of law, yet if when this rule of law ceases to operate upon her, she will promise to pay, it will bind her.

On the whole, I am not satisfied that a case can be found in the English books in which it has been held that a moral obligation is a sufficient consideration for an express promise, though there are many to the contrary, but that it is limited in its application to the cases where a good and valuable consideration has once existed, as laid down by the Supreme Court in Massachusetts, once and again adverted to.

I am therefore of opinion that there is error in the decree complained of, and that the judgment be reversed.

Hosmer, C. J., was of the same opinion.

Peters and Lanman, JJ., dissented.

BRAINARD, J., was absent.

Judgment reversed.

(ii.) Consideration need not be adequate to the promise, but must be of some value in the eye of the law.

SCHNELL v. NELL.

17 INDIANA, 29, -1861.

Appeal from the Marion Common Pleas.

Perkins, J. Action by J. B. Nell against Zacharias Schnell upon the following instrument:

"This agreement entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion County, State of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks Connty, State of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: whereas his wife, Theresa Schnell, now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties should receive the sum of \$200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly therefore reverts

to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: \$200 to the said J. B. Nell, \$200 to the said Wendelin Lorenz, and \$200 to the said Donata Lorenz, in the following instalments, viz.: \$200 in one year from the date of these presents; \$200 in two years, and \$200 in three years; to be divided between the parties in equal portions of \$66\frac{2}{3}\$ each year, or as they may agree, till each one has received his full sum of \$200.

"And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money (one cent), and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased.

"In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals.

"ZACHARIAS SCHNELL, (seal)
"J. B. NELL, (seal)
"WEN. LORENZ. (seal)"

The complaint contained no averment of a consideration for the instrument outside of those expressed in it; and did not aver that the one cent agreed to be paid had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, etc.

The will is copied into the record, but need not be into this opinion.

The court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See *Ind. Dig.*, p. 110. The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay \$600:

- 1. A promise, on the part of the plaintiffs, to pay him one cent.
- 2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.
- 3. The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of It is true that as a general proposition, inadequacy of consideration will not vitiate an agreement. Baker v. Roberts, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value for money or, perhaps, for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. Hardesty v. Smith, 3 Ind. 39. The consideration of one cent is plainly in this case merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him on that ground. A moral consideration only will not support a promise. Ind. Dig., p. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or a suit upon it, is not legally binding. Spahr v. Hollingshead, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise on two grounds: 1. They are past considerations. Ind. Dig., p. 13. 2. The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell and the Lorenzes a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife, a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See Stevenson v. Druley, 4 Ind. 519.

Per Curiam. The judgment is reversed, with costs. Cause remanded, etc.

DEVECTION v. SHAW & DEVRIES, Ex'rs.

69 MARYLAND, 199.-1888.

Bryan, J. John Semmes Devecmon brought suit against the executors of John S. Combs, deceased. He declared in the common counts and also filed a bill of particulars. After judgment by default, a jury was sworn to assess the damages sustained by the plaintiff. The evidence consisted of certain accounts taken from the books of the deceased, and testimony that the plaintiff was a nephew of the deceased, and lived for several years in his family, and was in his service as clerk forseveral years. The plaintiff then made an offer of testimony, which is thus stated in the bill of exceptions: "That the plaintiff took a trip to Europe in 1878, and that said trip was taken by said plaintiff, and the money spent on said trip was spent by

the said plaintiff at the instance and request of said Combs, and upon a promise from him that he would reimburse and repay to the plaintiff all the money expended by him in said trip; and that the trip was so taken and the money so expended by the said plaintiff, but that the said trip had no connection with the business of said Combs; and that said Combs spoke to the witness of his conduct in being thus willing to pay his nephew's expenses as liberal and generous on his part." On objection, the court refused to permit the evidence to be given, and the plaintiff excepted.

It might very well be, and probably was the case, that the plaintiff would not have taken a trip to Europe at his own expense. But whether this be so or not, the testimony would have tended to show that the plaintiff incurred expense at the instance and request of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means, on express promise of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present, or render him a gratuitous service. It is nothing to the purpose that the plaintiff was benefited by the expenditure of his own money. He was induced by this promise to spend it in this way, instead of some other mode. If it is not fulfilled, the expenditure will have been procured by a false pretense.

As the plaintiff, on the theory of this evidence, had fulfilled his part of the contract, and nothing remained to be done but the payment of the money by the defendant, there could be a recovery in *indebitatus assumpsit*; and it was not necessary to declare on the special contract. The fifth count in the declaration is for "money paid by the plaintiff for the defendants' testator in his lifetime, at his request." In the bill of particulars we find this item: "To cash contributed by me, J. Semmes Devecmon, out of my own money, to defray my expenses to Europe and return, the said John S. Combs, now deceased, having promised me in 1878 'that if I would contribute part of

my own money towards the trip, he would give me a part of his, and would make up to me my part, and the amount below named is my contribution, as follows," etc. It seems to us that this statement is a sufficient description of a cause of action covered by the general terms of the fifth count. The evidence ought to have been admitted.

The defendants offered the following prayer, which the court granted:

"The defendants, by their attorneys, pray the court to instruct the jury that there is no sufficient evidence in this case to entitle the plaintiff to recover the interest claimed in the bill of particulars, marked 'Exhibit No. 1, Bill of Particulars.'"

The only evidence bearing on this question is the account taken from the books of the deceased which was offered in evidence by the plaintiff. This account showed on its face a final settlement of all matters embraced in it. In the absence of proof showing errors of some kind, the parties must be concluded by it in all respects. We think the prayer was properly granted.

Judgment reversed, and new trial ordered.

HAMER v. SIDWAY.

124 NEW YORK, 538, -1891.

Appeal from an order of the General Term of the Supreme Court which reversed a judgment in favor of plaintiff entered at the trial at Special Term.

The action was brought by plaintiff, as assignee, against defendant, as executor, upon a contract alleged to have been made between plaintiff's remote assignor and defendant's testator.

PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, . . . William E. Story agreed to and with William E. Story, 2d, that if he would

refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of \$5000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. chequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson's Prin. of Con. 63.

"In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Parsons on Contracts, 444.

"Any damage, or suspension or forbearance of a right, will be sufficient to sustain a promise." Kent, Vol. 2, 465, 12th ed.

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the

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present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

In Shadwell v. Shadwell (9 C. B. N. S. 159) an uncle wrote to his nephew as follows:

"My DEAR LANCEY - I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay to you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall require.

> "Your affectionate uncle. "CHARLES SHADWELL."

It was held that the promise was binding and made upon good consideration.

In Lakota v. Newton, an unreported case in the Superior Court of Worcester, Mass., the complaint averred defendant's promise that "if you (meaning plaintiff) will leave off drinking for a year I will give you \$100," plaintiff's assent thereto, performance of the condition by him, and demanded judgment there-Defendant demurred on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled.

In Talbott v. Stemmons (a Kentucky case not yet reported),1 the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson, Albert R. Talbott, \$500 at my death, if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death, and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained and an appeal taken therefrom to the Court of Appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health; nevertheless, the surrender of that right caused the promise, and having the right to contract with reference to the subject matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in Lindell v. Rokes, 60 Mo. 249.

The cases cited by the defendant on this question are not in In Mallory v. Gillett (21 N. Y. 412), Belknap v. Bender (75 Id. 446), and Berry v. Brown (107 Id. 659), the promise was in contravention of that provision of the statute of frauds which declares void all promises to answer for the debts of third persons unless reduced to writing. In Beaumont v. Reeve (Shirley's L. C. 6) and Porterfield v. Butler (47 Miss. 165) the question was whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. Duvoll v. Wilson (9 Barb. 487) and In re Wilber v. Warren (104 N. Y. 192) the proposition involved was whether an executory covenant against incumbrances in a deed given in consideration of natural love and affection could be enforced. derbilt v. Schreyer (91 N. Y. 392) the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guarantee its payment, which was done. It was held that the guarantee could not be enforced for want of consideration. For in building the house the plaintiff only did that which he had contracted to do. And in Robinson v. Jewett (116 N. Y. 40) the court simply held that "the performance of an act which the party is under legal obligation to perform cannot constitute a consideration for a new contract." It will be observed that the agreement which we have been considering was within the condemnation of the statute of frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the statute of frauds, and, therefore, such defense could not be made available unless set up in the answer. Porter v. Wormser, 94 N. Y. 431, 450. This was not done.

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal, that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of \$5000, and if this action were founded on that contract it would be barred by the statute of limitations which has been pleaded, but on that date the nephew wrote to his uncle as follows:

"DEAR UNCLE—I am now 21 years old to-day, and I am now my own boss, and I believe, according to agreement, that there is due me \$5000. I have lived up to the contract to the letter in every sense of the word."

A few days later, and on February sixth the uncle replied, and, so far as it is material to this controversy, the reply is as follows:

"Dear Nephew — Your letter of the 31st ult. came to hand all right saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have \$5000 as I promised you. I had the money in the bank the day you was 21 years old that I intended for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I

think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. . . . This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. . . .

"W. E. STORY.

"P.S. - You can consider this money on interest."

The trial court found as a fact that "said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter." And further, "That afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred, and assigned all his right, title, and interest in and to said sum of \$5000 to his wife Libbie H. Story, who thereafter duly sold, transferred, and assigned the same to the plaintiff in this action."

We must now consider the effect of the letter, and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee and cestui que trust? If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated. Lewin on Trusts, 55.

A person in the legal possession of money or property acknowledging a trust with the assent of the cestui que trust, becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. 2 Story's Eq. § 972. If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor's account will have the effect to create a trust. Day v. Roth, 18 N. Y. 448.

It is essential that the letter interpreted in the light of surrounding circumstances must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the prom-White v. Hoyt, 73 N. Y. 505, 511. At the time the uncle wrote the letter he was indebted to his nephew in the sum of \$5000, and payment had been requested. The uncle, recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say "I will pay you at some other time," or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had "earned" for him, so that when he should be capable of taking care of it he should receive it with interest. He said: "I had the money in the bank the day you were 21 years old that I intended for you, and you shall have the money certain." That he had set apart the money is further evidenced by the next sentence: "Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it." Certainly, the uncle must have intended that his nephew should understand that the promise not "to interfere with this money" referred to the money in the bank which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word "trust," or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept. without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: "This money you have earned much easier than I did . . . you are quite welcome I had it in the bank the day you were 21 years old, and don't intend to interfere with it in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me." In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.

The learned judge who wrote the opinion of the General Term,

seems to have taken the view that the trust was executed during the lifetime of defendant's testator by payment to the nephew, but as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

Order reversed and judgment of Special Term affirmed.

- a. First test of reality. Did the promisee do, forbear, suffer, or promise anything in respect of his promise?
 - (a) Motive must be distinguished from consideration.

FINK v. COX.

18 JOHNSON (N. Y.), 145.-1820.

Assumpsit to recover the amount of a promissory note given by defendant's testator to his son, the plaintiff. Verdict for plaintiff, subject to the opinion of the court as to the law of the case.

Spencer, C. J., delivered the opinion of the court. The question in this case is, whether there is a sufficient consideration for the note on which this suit is founded. It appears from the declaration of the testator when the note was given, that he intended it as an absolute gift to his son, the plaintiff; alleging that the plaintiff was not so wealthy as his brothers, that he had met with losses, and that he and his brothers had had a controversy about a stall. Such were the reasons assigned for his giving the note to the plaintiff.

There can be no doubt that a consideration is necessary to uphold the promise, and that it is competent for the defendant to show that there was no consideration. 17 Johns. Rep. 301; Schoonmaker v. Roosa and De Witt. The only consideration pretended is that of natural love and affection from a father to a child; and if that is a sufficient consideration, the plaintiff is entitled to recover, otherwise not.

It is conceded that the gift, in this case, is not a donatio causa mortis, and cannot be supported on that ground. In Pearson v. Pearson (7 Johns. Rep. 26) the question was, whether the gift of a note signed by the defendant to the plaintiff was such a vested gift, though without consideration, as to be valid in law; we held that it was not, and that a parol promise to pay money, as a gift, was no more a ground of action than a promise to deliver a chattel as a gift; and we referred to the case of Noble v. Smith (2 Johns. Rep. 52), where the question underwent a full discussion and consideration. The case of Grangiac v. Arden (10 Johns. Rep. 293) was decided on the principle that the gift of the ticket had been completed by delivery of possession, and is in perfect accordance with the former cases.

It has been strongly insisted that the note in the present case, although intended as a gift, can be enforced on the consideration of blood. It is undoubtedly a fair presumption that the testator's inducement to give the note sprang from parental regard. The consideration of blood, or natural love and affection, is sufficient in a deed, against all persons but creditors and bona fide purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held sufficient. In such a case the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss, or prejudice of the promisee. The note here manifested a mere intention to give the one thousand dollars. It was executory, and the promisor had a locus pænitentiæ. It was an engagement to give, and not a gift. of the cases cited by the plaintiff's counsel maintain the position, that because a parent, from love and natural affection, engages to give his son money, or a chattel, that such a promise can be enforced at law.

Judgment for the defendant.1

¹ Accord: Whitaker v. Whitaker, 52 N. Y. 368; Schnell v. Nell, 17 Ind. 29, ante, p. 138. Cf. Smith v. Perine, 121 N. Y. 376, 384.

(β) Consideration must move from promisee.

Note. — For cases on the proposition that the consideration must move from the promisee, see cases under "Limits of Contractual Obligation," post, Part III. Ch. I. § 2.

- b. Second test of reality. Was the promisee's act forbearance, sufferance, or promise of any ascertainable value?
 - (a) Prima facie impossibility.

BEEBE v. JOHNSON.

19 WENDELL (N. Y.), 500. - 1838.

This was an action of covenant.

On the 21st January, 1833, Johnson, for the consideration of \$5000, conveyed by deed to Beebe, the sole and exclusive right to make, use, and vend in Upper and Lower Canada, in certain counties of this State, and in other places, a threshing machine which had been patented to one Warren, and covenanted to perfect the patent right in England as soon as practicable and within a reasonable space of time, so as to secure to Beebe the entire control of the provinces of Upper and Lower Canada. In April, 1834, Beebe commenced this suit, and in his declaration, after setting forth the contract, averred, that although a reasonable time for the purpose had long since elapsed, that Johnson had not perfected the patent right in England, or otherwise secured to him the sole and exclusive right of making, using, and vending the machine in the provinces of Upper and Lower Canada. further averred, that Johnson and himself being citizens of the United States, Johnson could not obtain, either for himself or for Beebe, the plaintiff, from the proper authorities in Canada, the exclusive right of vending the machine within those provinces; and so, he said, Johnson had not kept his covenant. The defendant pleaded the general issue, and gave notice of special matter to be proved on the trial. On the trial of the cause the plaintiff read in evidence a letter of the defendant, dated 8th April, 1833, in which he admitted, in substance, that in the negotiation between the parties the exclusive right of vending the machine

in the Canadas had been estimated at \$500. The plaintiff also proved by a witness, who had been employed in the Canadas by him in vending the article, that the exclusive right of vending it there would, in his opinion, be worth \$500. By a written stipulation between the parties, it was admitted that the patent right could not be perfected in England, because the authority to grant letters patent for such improvements was vested in the provinces, and that in the provinces the exclusive right of vending improvements of this nature can be conferred only upon a subject of Great Britain, and a resident of the provinces, and that the patentee, the plaintiff, and the defendant are all citizens of the United States, and cannot become subjects of Great Britain short of a residence in the provinces of seven years. The jury found a verdict for the plaintiff of \$601.23, being the sum of \$500, with the interest thereof from the date of the deed declared upon. The defendant's counsel having moved for a nonsuit, which was overruled, and having excepted to the charge of the judge, now moved for a new trial. The principal grounds relied upon in support of the application will appear from the opinion delivered refusing a new trial.

Nelson, C. J. It is supposed by the counsel for the defendant that a legal impossibility prevented the fulfilment of the covenant to perfect the patent right in England, so as to secure the monopoly of the Canadas to the plaintiff, and hence that the obligation was dispensed with, so that no action can be maintained. There are authorities which go that length, Co. Litt. 206, b.; Shep. Touch. 164; 2 Co. Litt. 26; Platt. on Cov. 569; but if the covenant be within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld: as where one covenants it shall rain to-morrow, or that the Pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for, if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible. 3 Comyn's Dig. 93; 1 Roll. Abr. 419. Now it is clear that the fulfilment in this case cannot be considered an impossibility within the above exposition of the rule; because, for anything we know to the contrary, the exclusive right to

make, use, and vend the machine in the Canadas, might have been secured in England by act of Parliament or otherwise; at least, there is nothing in all this necessarily impossible. These provinces are a part of the British Empire, and subject to the power of the Parliament at home; which body might very well grant the privilege the defendant covenanted to procure. Certainly we are unable to say the government cannot or would not by any means grant it. There is, then, nothing in the case to take it out of the rule in Paradine v. Jane (Aleyn, 27) as expounded by Chambre, J., in Beale v. Thompson (3 Bos. & Pull. 420), namely, if a party enter into an absolute contract without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay damages; his liability arising from his own direct and positive undertaking. 6 T. R. 750; 8 Id. 267, Lawrence, J.; 10 East, 533; 4 Carr. & Payne, 295; 1 Selw. 344.

It has also been said that the action cannot be maintained, as the covenant contemplated the violation of the laws of England. We are unable to perceive the force of this objection, as the fulfilment of the covenant necessarily required the procurement of lawful authority to make and vend the machine in the Canadas. It is difficult to understand how this could be accomplished by other than lawful means. That it might be by such, we have already considered not impossible.

Again, it was said the contract was void because it contemplated a renunciation of citizenship by the defendant. Whether, if the fact was admitted, the consequence would follow, we need not stop to consider, because it is very clear that no such step is necessarily embraced in the covenant. For aught we know, the patent might be procured without such renunciation; and if it were considered unlawful to contract for expatriation, inasmuch as this agreement does not necessarily contemplate it, we would be bound to hold that the defendant assumed to procure the patent without it. But even in England, the common law rule against the expatriation of the subject is so far modified that naturalization abroad for commercial purposes is recognized, and is of course lawful. 1 Comyn, 677; 8 T. R. 31; 1 Bos. & Pull.

430, 440, 444; 2 Kent's Comm. 49; 1 Peter's C. C. R. 159. In the case of Wilson v. Marryat (8 T. R. 31, and 1 Bos. & Pull. 430) it was decided that Collet, a natural-born subject of Great Britain, having become a citizen of the United States, according to our laws, was entitled to all the advantages of an American citizen under the treaty of 1794. There the defendant undertook to avoid a policy of insurance procured by the plaintiff for the benefit of Collet upon an American ship and cargo, of which he was master, on the ground that he was a British subject, and therefore the trade in which he was engaged illegal, being in violation of the privileges of the East India Company, which trade was secured to American citizens by the treaty of 1794.

New trial denied.

STEVENS v. COON.

1 PINNEY (Wis.), 356.—1843.

Dunn, C. J. Error is brought in this case to reverse a judgment of the District Court of Jefferson County.

Coon, plaintiff below, brought his action of assumpsit against Stevens, defendant below, to recover damages on a liability growing out of a contract, which is in the words, etc., following, viz.:

"Astor, March 23, 1839.

"In consideration of C. J. Coon entering the west half of the northwest quarter of section 35, in town 13, range 13, I bind myself that the said eighty acres of land shall sell, on or before the 1st October next, for two hundred dollars or more, and the said Coon agrees to give me one-half of the amount over two hundred dollars said land may sell for in consideration of my warranty.

"HAMILTON STEVENS.

"I agree to the above contract.

"C. J. COON."

At the August term of the said Jefferson County District Court, in the year 1840, the said defendant Stevens pleaded the general issue which was joined by the said plaintiff Coon, and after several continuances the case was tried at the October term, 1842. On the trial, the above contract, and the receiver's receipt

to said plaintiff Coon, for the purchase money for said tract of land described in said contract, were read in evidence to the jury; and Abraham Vanderpool, a witness, testified "that he had visited that part of the country where the land lies, specified in said writing, and was upon the same, as he has no doubt, and estimated the present value of the same at \$1.50 per acre, and that in October, 1839, it might be worth \$1.25 an acre." Upon this evidence and testimony the plaintiff rested his case.

Under the construction put on the contract read in evidence, the jury found for the plaintiff \$116.50 in damages, and judg-There is manifest error in this ment was entered thereon. decision of the court. From an inspection of the contract, it is obvious that it is not such an one as is obligatory on either party. There is no reciprocity of benefit, and it binds the defendant below to the performance of a legal impossibility, so palpable to the contracting parties that it could not have been seriously intended by the parties as obligatory on either. undertaking of the defendant below is, "that plaintiff's tract of land shall sell for a certain sum by a given day." Is it not legally impossible for him to perform this undertaking? Certainly, no man can in legal contemplation force the sale of another's property by a given day, or by any day, as of his own The plaintiff was well apprised of the deficiency of his contract on the trial, as the testimony of his witness was entirely apart from the contract sued on, and was directed in part to a different contract, and such an one as the law would have recog-If the contract had been that the tract of land would be worth \$200 by a given day, then it could have been recovered on, if it did not rise to that value in the time. 1 Comyn on Contracts, 14, 16, 18; Comyn's Dig., title "Agreement"; 1 Pothier on Obligations, 71; 6 Petersdorf's Abridg. 218; 2 Sand. 137 (d). The District Court should not have entered judgment on the finding of the jury in this case. The construction of the contract by the District Court was erroneous.

Judgment reversed with costs.1

¹ Cf. Merrill v. Packer, 80 Ia. 542, post, p. 340; Kitchen v. Loudenback, 48 Oh. St. 177.

(β) Uncertainty.

SHERMAN v. KITSMILLER, Adm'r.

17 SERGEANT & RAWLE (PENN.), 45. - 1827.

Duncan, J. The declaration contains four counts:

- 1. On the special promise to give Elizabeth Koons one hundred acres of land, in consideration that she should live with the intestate, as his housekeeper, until her marriage, with an averment that she did live with him, and keep his house until her marriage.
- 2. That he would give her one hundred acres of land, if she lived with him until her marriage, and married the plaintiff, George Sherman, with an averment that she did live with him until she intermarried with George Sherman.
- 3. Is a promise to give her one hundred acres of land, if she married George Sherman, with an averment that she intermarried with George Sherman.
 - 4. Is a quantum meruit for work, labor, and services.

The error assigned is, in that part of a long charge in which the court say, "There can be no recovery, unless there was a legal promise, seriously made; if a promise is so vague in its terms as to be incapable of being understood, and of being carried into effect, it cannot be enforced. If George Sherman had reference to no particular lands, if he did not excite or intend to excite, a hope or expectation in Elizabeth Koons, that after her marriage with George Sherman she should get any land, such promise would not be so perfect as to furnish the ground of an action for damages. But if George Sherman was seized of several tracts in the vicinity, and he promised her one hundred acres, in such a manner as to excite an expectation in her that it was a particular part of his lands so held by him, though not particularly describing or specifying its value, or by whom; and if, in pursuance of such promise, she did marry George Sherman, then the action might be sustained."

Now, let us put the case of the plaintiffs in the most favorable light, without regarding the form of the declaration, and admit that the proof met the allegation, the special promise of the one hundred acres of land, the consideration of the promise, marriage, and its execution, and living with the defendant's intestate until the marriage, the charge of the court was, in the particular complained of, more favorable to the plaintiffs than their case warranted. It should have been, on the question put to the court, that the promise could not support the action; that the defendant's intestate did not assume to convey any certain thing, to convey any certain or particular land, or that could, with reference to anything said by him, refer to anything certain. Whereas the court submitted to the jury whether it did refer to anything certain, viz., lands of the intestate in the vicinity; and that without one spark of evidence to authorize the jury to make such an inference or draw such conclusion. And if the verdict had been for the plaintiffs, on either of these three counts, the judgment would have been reversed for this error. The jury have found that the promise referred to nothing certain, no particular lands anywhere of which the promisor was seized. Except the count on the quantum meruit, for the reasonable allowance for the services of Elizabeth Koons, it was not an action of indebitatus assumpsit, but an action on the special contract — an action to recover damages sustained by the plaintiff for the breach of a promise to convey one hundred acres of land, an action for not specifically executing the contract. can be no implied promise, because, whatever the undertaking was as to the one hundred acres, it was express; the action is brought on the express promise, and that only lies where a man by express words assumes to do a certain thing. Com. Dia., title "Assumpsit upon an Express Promise," A. 3. Not that this means an absolute certainty, but a certainty to a common intent, giving the words a reasonable construction. But the words must show the undertaking was certain; for, in assumpsit for non-payment of money, it is necessary to reduce the amount to a certainty; or, on a quantum meruit, by an averment, where the amount does not otherwise appear. Express promises or contracts ought to be certain and explicit, to a common intent at least. 1 Com. on Cont. They may be rendered certain by a reference to something certain, and the cases to be found in the books as to the nature of this reference are generally on promises

of marriage; as, where A, in consideration that B would marry his daughter, promised to give with her a child's portion, and that at the time of his death he would give to her as much as any of his other children, except his eldest son, - this was holden to be a good promise; for, although a child's portion is altogether uncertain, yet what the rest of the children, except the eldest, got, reduces it to a sufficient certainty. Silvester's Case, Popham, 148; 2 Roll. Rep. 104. But if a citizen of London promises a child's portion, that of itself is sufficiently certain; for, by the custom there, it is certain how much each child shall have. 2 Roll. Rep. 104; 1 Lev. 88. Now here, the court instructed the jury, that if they could find this promise to refer to anything certain, any land in particular, the action could be maintained. This was leaving it to the jury more favorably for the plaintiffs than ought to have been done; for the jury should have been instructed, that as there was nothing certain in the promise, nothing referred to, to render it certain, the action could not be maintained. contract was an express one, -- nothing could be raised by implication, - no other contract could be implied. By the statute of frauds and perjuries, such a promise would be void in England, not being in writing; and, although that provision is not incorporated in our act on the subject, this would be matter of regret, if such loose speeches should be held to amount to a solemn binding promise, obliging the speaker to convey one hundred acres of his homestead estate, or pay the value in money. If a certain explicit, serious promise was made with her, though not in writing, if marriage was contracted on the faith of it, and the promise was certain of some certain thing, it would be binding.

There would, in the present case, be no specific performance decreed in a court of chancery; the promisor himself would not know what to convey, nor the promisee what to demand. If it had been a promise to give him one hundred pieces of silver, this would be too vague to support an action; for what pieces?—fifty-cent pieces or dollars?—what denomination? One hundred cows or sheep would be sufficiently certain, because the intention would be, that they should be at least of a middling quality; but one hundred acres of land, without locality, without estimation of value, without relation to anything which could render it certain.

does appear to me to be the most vague of all promises; and, if any contract can be void for its uncertainty, this must be. One hundred acres on the Rocky Mountain, or in the Conestoga Manor—one hundred acres in the mountain of Hanover County, Virginia, or in the Conewango rich lands of Adams County—one hundred acres of George Sherman's mansion-place at eighty dollars per acre, or one hundred acres of his barren lands at five dollars.

This vague and void promise, incapable of specific execution, because it has nothing specific in it, would not prevent the plaintiffs from recovering in a quantum meruit for the value of this young woman's services until her marriage. If this promise had been that, in consideration of one hundred pounds, the defendant's testator promised to convey her one hundred acres of land, chancery would not decree a specific performance, or decree a conveyance of any particular land; yet the party could recover back the money he had paid in an action. As, where a young man, at the request of his uncle, lived with him, and his uncle promised to do by him as his own child, and he lived and worked with him above eleven years; and his uncle said his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him as a compensation for his services, but died without doing anything for his nephew, or making him any compensation, it was held that an action on an implied assumpsit would lie against the executors for the work and labor performed by the nephew for the testator. Jacobson v. The Executors of Le Grange, 3 Johns. 199. In Conrad v. Conrad's Administrators (4 Dall. Pa. 130) a plantation was bought by the plaintiff, an illegitimate son of the defendant's intestate, on a special agreement that if the plaintiff would live with the intestate, and work his plantation for six years, he would give and convey to him one hundred acres of the land. This was held a good promise, because it was certain - one hundred acres of the plantation on which the father lived. But in this case the jury have negatived all idea of an agreement to give Miss Koons one hundred acres of any particular kind or quality of land, of any certain description, on which any value could be put. In 2 Yeates, 522, in an action on a promise to convey a tract of land in Northumberland County to the plaintiff, the promise was in the first instance gratuitous, but the plaintiff had paid the scrivener to draw the conveyance, which was held to be a sufficient consideration for the promise; the action was for damages for not conveying it. No evidence was given of the value of the land. The court stated the difficulty of giving damages for not conveying lands of the value of which nothing appeared. The plaintiff's counsel admitted the want of evidence of the value of the land was an incurable defect. If the defect of evidence of value would be incurable, the defect of all allegation or proof of anything by which the value could be regulated. anything to afford a clue to the jury by which to discover what was intended to be given, any measure of damages, would be fatal. The promise is as boundless as the terrestrial globe. party would lie at the mercy of the jury - there would be the same reason for ten thousand dollars damages as ten cents. The court could not set aside the verdict in any case, either on account of extravagance or smallness of damages, for there is nothing by which to measure them; but the arbitrary discretion or the caprice of the jury must decide them, without evidence and without control. It cannot be compared to actions of slander, where the jury have a wide range, and must exercise some latitude, - it is an action on an express promise, which the law says must be to perform something either certain to a common intent, or by a reference to something which can render it certain. contracts which can be enforced specifically, or where damages are to be given for their non-performance, there is always a measure of damages; in actions affecting the reputation, the person, or the liberty of a man, they must depend, in some measure, on the direction of the jury. If the jury go beyond the standard, the value ascertained by evidence of the thing contracted for, or under its value, the court will set aside the verdict, but in the vindictive class of actions, the damages must be outrageous to justify the interference of the court, - seldom, if ever, for smallness of damages. There is a great difference between damages which can be ascertained, as in assumpsit, trover, etc., where there is a measure, and personal torts, as false imprisonment, slander, malicious prosecution, where damages are

matter of opinion. To say that nominal damages, at least, ought to be given, is taking for granted the very matter in controversy; for the legal question is, was there an actionable promise—a promise to do anything certain, or certain to a common intent, or where, by reference to anything, it would be rendered certain? The jury have negatived all this.

I am therefore of opinion that there was no error in the opinion of the court, by which the plaintiffs have been endamaged; that the law was laid down more favorably for them than the evidence warranted.

Judgment affirmed.

(γ) Forbearance to sue.

PENNSYLVANIA COAL CO. v. BLAKE.

85 NEW YORK, 226.—1881.

Action to foreclose a mortgage. Judgment in favor of plaintiff. Appeal from decision of the General Term of the Supreme Court affirming judgment.

In March, 1873, plaintiff agreed with B. & Co. that if B. & Co. would give their notes secured by a mortgage on the separate estate of B.'s wife, the defendant, it would grant an extension of time on a debt then due from B. & Co. to plaintiff. The notes were given in pursuance of the agreement, and about three weeks later defendant executed the mortgage in question. Defendant testified that she never received any consideration for executing the mortgage, that she never requested an extension of time for B. & Co. from plaintiff, nor did she know whether or not an extension had ever been given.

FOLGER, C. J. The first point made by the appellant is, that the mortgage given by her was without consideration, and is void.

It is so, that the appellant took no money consideration, nor any strictly personal benefit, for the giving of the mortgage by her. It was made for the benefit of others than her, entirely as a security for debts owing by them, and to procure for them further credit and favor in business. In other words, the lands of the appellant became the surety for the liabilities of the business firm of which her husband was a member. It is so, also, that the contract of surety needs a consideration to sustain it, as well as any other contract. Bailey v. Freeman, 4 Johns. 280; Leonard v. Vredenburgh, 8 Id. 29. But that need not be something passing from the creditor to the surety. Benefit to the principal debtor, or harm or inconvenience to the creditor, is enough to form a consideration for the guaranty; and the consideration in that shape may be executory as well as executed at the time. McNaught v. McClaughry, 42 N. Y. 22; 8 Johns., supra. Now here was an agreement by the plaintiff to extend the payment of part of the debt owing by the principal debtor for a definite time, if the debtor would procure the mortgage of the appellant as a security for the ultimate payment of the amount of the debt thus extended. Sage v. Wilcox, 6 Conn. 81; Breed v. Hillhouse, 7 Id. 523. Though the actual execution of the mortgage by the appellant was on a day subsequent to that of the agreement between the creditor and the principal debtors, and subsequent to the dates of the extension notes, the mortgage and the notes were made in pursuance of that agreement, in consideration of it and to carry it out. The findings are full and exact on this point, and are sustained by the testimony. There is no proof that the actual delivery of the notes and mortgage was not cotemporaneous; though the dates of the notes and the mortgage and the entry of credit in the books of the plaintiff do not correspond. All was done in pursuance of one agreement, and the plaintiff was not bound to forbearance until the mortgage was delivered. It was not until then that the agreement to forbear was fixed and the consideration of benefit to the principals was had. not, therefore, a past consideration.

It follows that the judgment appealed from should be affirmed. All concur. Judgment affirmed.

FOSTER v. METTS & CO.

55 MISSISSIPPI, 77. - 1877.

Action upon promissory note. Defendants demurred; demurrer sustained. Error to the Circuit Court. Two hundred dollars belonging to the plaintiff in error, Foster, were stolen from the United States mail by a carrier employed by the defendants in error, Metts & Co., who were contractors for carrying the mail from Louisville to Artesia. At first, Metts & Co. denied any liability to Foster for the loss, but finally, upon consideration that Foster would wait a few months for payment, Metts & Co. gave to him their promissory note for the amount lost. The note not being paid at maturity, this action was brought upon it.

Campbell, J. . . . In this case the money was stolen by the mail-carrier. As to that, he certainly was not the agent of the contractors for whom he was riding, and, if they were liable for his acts within the scope of his employment, they were not liable for his wilful wrongs and crimes. McCoy v. McKowen, 26 Miss. 487; New Orleans, Jackson & Great Northern R. R. Co. v. Harrison, 48 Miss. 112; Foster v. Essex Bank, 17 Mass. 479; Wiggins v. Hathaway, 6 Barb. 632; Story on Ag., sec. 309.

As the defendants in error were not liable for the money "extracted" from the mail by the carrier, they did not make themselves liable by giving their promissory note for it. It is without consideration. The compromise of doubtful rights is a sufficient consideration for a promise to pay money, but compromise implies mutual concession. Here there was none on the part of the payee of the note. His forbearance to sue for what he could not recover at law or in equity was not a sufficient consideration for the note. Newell v. Fisher, 11 Smed. & M. 431; Sullivan v. Collins, 18 Iowa, 228; Palfrey v. Railroad Co., 4 Allen, 55; Allen v. Prater, 35 Ala. 169; Edwards v. Baugh, 11 Mee. & W. 641; Longridge v. Dorville, 5 Barn. & Ald. 117; 1 Pars. on Con. 440; Smith on Con. 157; 1 Add. on Con. 28, sec. 14; 1 Hill on Con. 266, sec. 20.

Judgment affirmed.

(δ) Compromise.

RUSSELL v. COOK.

3 HILL (N. Y.), 504. - 1842.

Error to the Onondaga common pleas. Russell recovered judgment before a justice against Cook and Smith on a promissory note made by them, payable to Sanford B. Palmer or bearer, for \$68.34, with interest, and bearing date April 4, 1836. The note fell due in July, 1837, and was transferred to the plaintiff after that time. The defendants insisted that the note was without consideration.

Cowen, J. The defendants below admitted the execution of the note; and the burthen of showing that it was without consideration lay on them. They accordingly proved that several years before suit brought, they undertook with Palmer & Noble to transport from Manlius to Albany certain barley in which they (Palmer & Noble) had a special property, and which they were bound to see delivered at Albany to Taylor. The defendants were common carriers by their boat on the canal, which, owing to its accidentally striking a stone in the canal, of which the defendants could not be perfectly aware, was broken, sunk, and the water let in upon the barley, by which it was much injured. A dispute arose between the parties whether the defendants were liable, and this was compromised by Palmer & Noble agreeing to discount one half of their claim, and the defendants agreeing to pay the other. The half which fell upon the defendants was secured by several promissory notes, of which the note in question was one. The estimate of damages was deliberately and fairly made. Palmer & Noble were guilty of no fraud; the defendants were fully aware of all the facts; and there was no mistake in the case. This is the defense, as made out by the defendants' own testimony. The court below submitted to the jury whether the notes were made without consideration, and the jury found for the defendants.

I am of opinion that the court below erred in omitting to charge the jury that the plaintiff was entitled to recover. No one would think of denying, that at least the dispute between the parties was doubtful, and that probably the law was against the defendants on the facts disclosed by their evidence. It is enough, however, that it was doubtful, and that the notes were given in pursuance of an agreement to compromise, in no way impeached for want of fairness. To show that this is so, I shall do little more than refer to Chit. on Cont. 43, 44, ed. of 1842, and the notes, where cases are cited which refuse to open an agreement of this kind, under circumstances much stronger in favor of the defendant than exist here on the most liberal construction which the defense can pretend to claim. The case of O'Keson v. Barclay (2 Pennsyl. R. 531) sustained a promissory note given on the settlement of a slander suit for words not actionable. In such cases it matters not on which side the right ultimately turns out to be. The court will not look behind the compromise. Taylor v. Patrick, 1 Bibb, 168; Fisher v. May's Heirs, 2 Id. 448. It is not necessary, however, in the present case to go farther than was done in Longridge v. Dorville, 5 Barn. & Ald. 117. There the ship Carolina Matilda had run foul of the ship Zenobia in the Thames, and the former was arrested and detained by process from the admiralty to secure the payment of the damage. The agents for the owners of the Carolina Matilda stipulated with the agents for the owner of the Zenobia that, on the latter relinquishing their claim on the Carolina Matilda, the damages should be paid on due proof of them, if they did not exceed £180. The proceedings in the admiralty being withdrawn, an action was brought on the promise. The Carolina Matilda had a regular Trinity-house pilot on board when the collision took place; and there was some doubt on the law, therefore, whether the owners were liable. Held, that the compromise being of a claim thus doubtful, the defendants were absolutely bound, without regard to the question of actual liability. Abbott, C. J., said, "The parties agree to put an end to all doubts on the law and the fact, on the defendants' engaging to pay a stipulated sum." "The parties agreed to waive all questions of law and fact." Indeed, such is the intent of every compromise; and the best interests of society require that such should be the effect.

I therefore prefer putting the case on that ground, though I feel very little doubt that the defendants were liable to Palmer & Noble for the whole damages, instead of the half for which they were let off.

Judgment reversed.1

(ε) Gratuitous undertakings.

THORNE v. DEAS.

4 JOHNSON (N.Y.), 84. - 1809.

This was an action on the case, for a nonfeasance, in not causing insurance to be made on a certain vessel, called the Sea Nymph, on a voyage from New York to Camden, in North Carolina.

The plaintiffs were copartners in trade, and joint owners of one moiety of a brig called the Sea Nymph, and the defendant was sole owner of the other moiety of the same vessel. The brig sailed in ballast, the 1st December, 1804, on a voyage to Camden, in North Carolina, with William Thorne, one of the plaintiffs, on board, and was to proceed from that place to Europe or the West Indies. The plaintiffs and defendant were interested in the voyage, in proportion to their respective interests in the vessel. On the day the vessel sailed, a conversation took place between William Thorne, one of the plaintiffs, and the defendant, relative to the insurance of the vessel, in which W. Thorne requested the defendant that insurance might be made; to which the defendant replied, "that he (Thorne) might make himself perfectly easy on

¹ Grandin v. Grandin, 49 N. J. L. 508, 514 (1887): "The compromise of a disputed claim made bona fide is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded—the detriment to the party consenting to a compromise, arising from the alteration in his position, forms the real consideration which gives validity to the promise. The only elements necessary to a valid agreement of compromise are the reality of the claim made and the bona fides of the compromise. Cook v. Wright, 1 B. & S. 559-570; Callisher v. Bischoffsheim, L. R. (5 Q. B.) 449; Ockford v. Barelli, 25 L. T. 504; Miles v. N. Z. &c. Est. Co., 32 Ch. Div. 267, 283, 291, 298." See Bellows v. Sowles, 57 Vt. 164, ante, p. 110; Schnell v. Nell, 17 Ind. 29, ante, p. 138.

the subject, for that the same should be done." About ten days after the departure of the vessel on her voyage, the defendant said to Daniel Thorne, one of the plaintiffs, "Well, we have saved the insurance on the brig." D. Thorne asked, "How so? or whether the defendant had heard of her arrival?" To which the defendant answered, "No; but that, from the winds, he presumed that she had arrived, and that he had not yet effected any insurance." On this, D. Thorne expressed his surprise, and observed, "that he supposed that the insurance had been effected immediately, by the defendant, according to his promise, otherwise he would have had it done himself, and that, if the defendant would not have the insurance immediately made, he would have it effected." The defendant replied, that "he (D. Thorne) might make himself easy, for he would that day apply to the insurance offices, and have it done."

The vessel was wrecked on the 21st December, on the coast of North Carolina. No insurance had been effected. No abandonment was made to the defendant by the plaintiffs.

The defendant moved for a nonsuit on the ground that the promise was without consideration and void; and that, if the promise was binding, the plaintiffs could not recover, without a previous abandonment to the defendant. These points were reserved by the judge.

A verdict was taken for the plaintiffs, for one-half of the cost of the vessel, with interest, subject to the opinion of the court on the points reserved.

Kent, C. J., delivered the opinion of the court. The chief objection raised to the right of recovery in this case is the want of a consideration for the promise. The offer, on the part of the defendant, to cause insurance to be effected, was perfectly voluntary. Will, then, an action lie, when one party entrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for the nonfeasance. Sir

William Jones, in his Essay on the Law of Bailments, considers this species of undertaking to be as extensively binding in the English law as the contract of mandatum in the Roman law; and that an action will lie for damage occasioned by the non-performance of a promise to become a mandatary, though the promise be purely gratuitous. This treatise stands high with the profession, as a learned and classical performance, and I regret that, on this point, I find so much reason to question its accuracy. I have carefully examined all the authorities to which he refers. He has not produced a single adjudged case, but only some dicta (and those equivocal) from the Year Books, in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument.

A short review of the leading cases will show that, by the common law, a mandatary, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages are averred. Those who are conversant with the doctrine of mandatum in the civil law, and have perceived the equity which supports it and the good faith which it enforces, may, perhaps, feel a portion of regret that Sir William Jones was not successful in his attempt to engraft this doctrine, in all its extent, into the English law. I have no doubt of the perfect justice of the Roman rule, on the ground that good faith ought to be observed, because the employer, placing reliance upon that good faith in the mandatary, was thereby prevented from doing the act himself, or employing another to do it. This is the reason which is given in the Institutes for the rule: Mandatum non suscipere cuilibet liberum est; susceptum autem consummandum est, aut quam primum renunciandum, ut per semetipsum aut per alium, eandem rem mandator exequatur. Inst. lib. 3, 27, 11. But there are many rights of moral obligation which civil laws do not enforce, and are, therefore, left to the conscience of the individual, as rights of imperfect obligation; and the promise before us seems to have been so left by the common law, which we cannot alter, and which we are bound to pronounce.

The earliest case on this subject is that of Watton v. Brinth (Year Book, 2 Hen. IV. 3 b), in which it appears that the defendant promised to repair certain houses of the plaintiff, and had neglected to do it, to his damage. The plaintiff was nonsuited, because he had shown no covenant; and Brincheley said, that if the plaintiff had counted that the thing had been commenced, and afterwards, by negligence, nothing done, it had been otherwise. Here the court at once took the distinction between nonfeasance and misfeasance. No consideration was stated and the court required a covenant to bind the party.

In the next case, 11 Hen. IV. 33 a, an action was brought against a carpenter, stating that he had undertaken to build a house for the plaintiff within a certain time, and had not done it. The plaintiff was also nonsuited, because the undertaking was not hinding without a specialty; but, says the case, if he had undertaken to build the house, and had done it illy or negligently, an action would have lain, without deed. Brooke (Action sur le Case, pl. 40) in citing the above case, says, that "it seems to be good law to this day; wherefore the action upon the case which shall be brought upon the assumption, must state that for such a sum of money to him paid, etc., and that in the above case, it is assumed, that there was no sum of money, therefore it was a nudum pactum."

The case of 3 Hen. VI. 36 b is one referred to, in the Essay on Bailments, as containing the opinion of some of the judges, that such an action as the present could be maintained. It was an action against Watkins, a mill-wright, for not building a mill according to promise. There was no decision upon the question, and in the long conversation between the counsel and the court, there was some difference of opinion on the point. The counsel for the defendant contended that a consideration ought to have been stated; and of the three judges who expressed any opinion, one concurred with the counsel for the defendant, and another (Babington, C. J.) was in favor of the action, but he said nothing expressly about the point of consideration, and the third (Cokain, J.) said, it appeared to him that the plaintiff had so declared, for it shall not be intended that the defendant would build the mill for nothing. So far is this case from giving coun-

tenance to the present action, that Brooke (Action sur le Case, pl. 7, and Contract, pl. 6) considered it as containing the opinion of the court, that the plaintiffs ought to have set forth what the miller was to have for his labor, for otherwise it was a nude pact; and in Coggs v. Bernard, Mr. Justice Gould gave the same exposition of the case.

The general question whether assumpsit would lie for a nonfeasance agitated the courts in a variety of cases afterwards, down to the time of Henry VII. 14 Hen. VI. 18 b, pl. 58; 19 Hen. VI. 49 a, pl. 5; 20 Hen. VI. 34 a, pl. 4; 2 Hen. VII. 11, pl. 9; 21 Hen. VII. 41 a, pl. 66. There was no dispute or doubt, but that an action upon the case lay for a misfeasance in the breach of a trust undertaken voluntarily. The point in controversy was, whether an action upon the case lay for a nonfeasance, or nonperformance of an agreement, and whether there was any remedy where the party had not secured himself by a covenant or specialty. But none of these cases, nor, as far as I can discover, do any of the dicta of the judges in them go so far as to say, that an assumpsit would lie for the non-performance of a promise, without stating a consideration for the promise. And when, at last, an action upon the case for the non-performance of an undertaking came to be established, the necessity of showing a cousideration was explicitly avowed.

Sir William Jones says, that "a case in Brooke, made complete from the Year Book to which he refers, seems directly in point." The case referred to is 21 Hen. VII. 41, and it is given as a loose note of the reporter. The chief justice is there made to say, that if one agree with me to build a house by such a day, and he does not build it, I have an action on the case for this nonfeasance, equally as if he had done it amiss. Nothing is here said about a consideration; but in the next instance which the judge gives of a nonfeasance for which an action on the case lies, he states a consideration paid. This case, however, is better reported in Keilway, 78, pl. 5, and this last report must have been overlooked by the author of the Essay. Frowicke, C. J., there says, "that if I covenant with a carpenter to build a house, and pay him 201. to build the house by a certain day, and he does not do it, I have a good action upon the case, by reason of the payment of my money;

and without payment of the money in this case, no remedy. And yet, if he make the house in a bad manner, an action upon the case lies; and so for the nonfeasance, if the money be paid, action upon the case lies."

There is, then, no just reason to infer, from the ancient authorities, that such a promise as the one before us is good, without showing a consideration. The whole current of the decisions runs the other way, and, from the time of Henry VII. to this time, the same law has been uniformly maintained.

The doctrine on this subject, in the Essay on Bailments, is true, in reference to the civil law, but is totally unfounded in reference to the English law; and to those who have attentively examined the head of *Mandates*, in that Essay, I hazard nothing in asserting that that part of the treatise appears to be hastily and loosely written. It does not discriminate well between the cases; it is not very profound in research, and is destitute of true legal precision.

But the counsel for the plaintiffs contended, that if the general rule of the common law was against the action, this was a commercial question, arising on a subject of insurance, as to which a different rule had been adopted. The case of Wilkinson v. Coverdale (1 Esp. Rep. 75) was upon a promise to cause a house to be insured, and Lord Kenyon held, that the defendant was answerable only upon the ground that he had proceeded to execute the trust, and had done it negligently. The distinction, therefore, if any exists, must be confined to cases of marine insurance. In Smith v. Lascelles (2 Term Rep. 188) Mr. Justice Buller said it was settled law, that there were three cases in which a merchant, in England, was bound to insure for his correspondent abroad.

- 1. Where the merchant abroad has effects in the hands of his correspondent in England, and he orders him to insure.
- 2. Where he has no effects, but, from the course of dealing between them, the one has been used to send orders for insurance, and the other to obey them.
- 3. Where the merchant abroad sends bills of lading to his correspondent in England, and engrafts on them an order to insure, as the implied condition of acceptance, and the other accepts.

The case itself, which gave rise to these observations, and the two cases referred to in the note to the report, were all instances of misfeasance, in proceeding to execute the trust, and in not executing it well. But I shall not question the application of this rule, as stated by Buller, to cases of nonfeasance, for so it seems to have been applied in Webster v. De Tastet, 7 Term Rep. 157. They have, however, no application to the present The defendant here was not a factor or agent to the plaintiffs, within the purview of the law merchant. There is no color for such a suggestion. A factor, or commercial agent, is employed by merchants to transact business abroad, and for which he is entitled to a commission or allowance. Malyne, 81; Beawes, 44. In every instance given, of the responsibility of an agent for not insuring, the agent answered to the definition given of a factor, who transacted business for his principal, who was absent, or resided abroad; and there were special circumstances in each of these cases, from which the agent was to be charged; but none of those circumstances exist in this case. If the defendant had been a broker, whose business it was to procure insurances for others, upon a regular commission, the case might, possibly, have been different. I mean not to say, that a factor or commercial agent cannot exist, if he and his principal reside together at the same time, in the same place; but there is nothing here from which to infer that the defendant was a factor, unless it be the business he assumed to perform, viz., to procure the insurance of a vessel, and that fact alone will not make him a factor. Every person who undertakes to do any specific act, relating to any subject of a commercial nature, would equally become, quoad hoc. a factor; a proposition too extravagant to be maintained. It is very clear, from this case, that the defendant undertook to have the insurance effected, as a voluntary and gratuitous act, without the least idea of entitling himself to a commission for doing it. He had an equal interest in the vessel with the plaintiffs, and what he undertook to do was as much for his own benefit as theirs. It might as well be said, that whenever one partner promises his copartner to do any particular act for the common benefit, he becomes, in that instance, a factor to his copartner, and entitled to a commission. The plaintiffs have, then, failed

in their attempt to bring this case within the range of the decisions, or within any principle which gives an action against a commercial agent, who neglects to insure for his correspondent. Upon the whole view of the case, therefore, we are of opinion that the defendant is entitled to judgment.

Judgment for the defendant.1

- c. Third test of reality. Does the promisee do, forbear, suffer, or promise more than that to which he is legally bound?
 - (a) Delivering property wrongfully withheld.

TOLHURST v. POWERS.

133 NEW YORK, 460. - 1892.

Appeal from judgment of the General Term of the Supreme Court, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

This action was brought to recover a balance of an account originally due plaintiffs from one Clinton M. Ball for services in the construction and fitting of a dynamo and other electrical appliances, which it was claimed defendant had agreed to pay.

Finch, J. We agree with the prevailing opinion of the General Term that there was no consideration to support the promise of Powers to pay Ball's debt to the plaintiffs. The latter originally constructed a dynamo for which Ball became indebted to them, and after all payments he remained so indebted when the machine was ready for delivery. The builders, of course, had a lien upon it for the unpaid balance, but waived and lost their lien by a delivery to Ball without payment. He, being then the owner and holding the title free from any incumbrance, sold the dynamo to Crane on a contract apparently contingent upon the successful working of the machine. It did not work successfully and was sent back to plaintiffs to be altered, with a view of correcting its imperfections. At this point occurred the first

¹ See McCauley v. Davidson, 10 Minn. 418; Melbourne &c. R. Co. v. Louisville &c. R. Co., 88 Ala. 443.

intervention of the defendant Powers. He had not then obtained, so far as the case shows, any interest in the machine, and the complete title was either in Crane or Ball, or in both; but when the plaintiffs hesitated about entering upon the new work until their charges for it should be made secure, Powers agreed to pay them. The true character of that promise is immaterial, for, when the work was done, Powers did pay according to his con-Thereafter, Ball and Powers requiring a delivery of the dynamo, the plaintiffs undertook or threatened to retain the possession till the original debt should be paid. That they had no right to do. Their primary lien was lost by the delivery, and they acquired no new one by reason of the repairs which were paid for. Such refusal to surrender the possession was an absolute wrong without any color of right about it. After demand their refusal was a trespass, and according to their own evidence the sole consideration for the promise which they claim that Powers made to pay the old debt of Ball was their surrender of possession. To that they were already bound, and parted with nothing by the surrender. They gave up no right which they had against any one, but extorted the promise by a threat of what would have been, if executed, a wrongful conversion. Doing what they were already bound to do furnished no consideration for the promise.

It is said, however, that Ball made no demand, and until he did, the plaintiffs were not bound to deliver the possession, and that the delivery was to Powers and not to Ball. But there was certainly a request to ship the machine and so part with the possession, and both the request and the shipment were with the concurrence of Ball. It was that very request that brought up the subject of the old debt, and Ball stood by, plainly assenting, at least by omitting any dissent or objection. The shipment of Powers by name made it none the less a delivery to Ball, whose concurrence is explicitly found. Surely, after what happened, the latter could not have maintained an action for conversion on the ground that there had been no delivery to him. The undisputed fact is that the plaintiffs were seeking to withhold a delivery to the owner without the least right of refusal. was no harm to plaintiffs and no benefit conferred on Powers.

The former parted with nothing of their own, and the latter gained nothing, for the shipment to him was a delivery to Ball, the owner, since made with his concurrence, and Powers obtained no right or interest in the property as the result of the delivery. He simply took it, if he took at all, which is doubtful, as the agent or bailee of the owner, and acquired no right in it until a later period. Until the mortgage made subsequently, his advances for repairs constituted only an unsecured debt against Ball. The turning point of the appellant's argument is the unwarranted assumption that the plaintiffs agreed to deliver, and did deliver, the dynamo to one whom they knew not to be the owner without the assent of Ball, who was the owner, but who, nevertheless, stood by and made no objection. No fair construction of the evidence will sustain the appellant's theory.

The judgment should be affirmed, with costs. All concur.

Judgment affirmed.

(β) Performance of public duty.

SMITH v. WHILDIN.

10 PENNSYLVANIA STATE, 39.-1848.

In error from the Common Pleas of Philadelphia.

Assumpsit on the common counts. The plaintiff, who was a constable in Philadelphia, proved that the defendant had offered him a reward of \$100 for the arrest of one M. Crossin, against whom warrants had been issued on a charge for obtaining goods under false pretenses.

COULTER, J. There was no consideration for the promise, and the court below therefore misconceived the law. It is the duty of a constable to pursue, search for, and arrest offenders against whom criminal process is put into his hands. It is stated in Com. Digest (title Justice of the Peace, B. 79) that the duty of a constable requires him to do his utmost to discover, pursue, and arrest felons. The office of constable is created not for the private emolument of the holder, but to conserve the public peace, and to execute the criminal law of the country. He is

not the agent or employee of the private prosecutor, but the minister of the law, doing the work of the public, which he is bound to do faithfully for the fee prescribed by law, to be paid as the law directs. And it would be against public policy as well as against law to hold otherwise.

There are things which a constable is not officially bound to do, such as to procure evidence, and the like, and for this he may perhaps be allowed to contract. And this is the full extent of the principle in the case cited from 11 Ad. and El. 856. But it has been held that even a sailor cannot recover for extra work on a promise by the master to pay for extra work in managing the ship in peril, the sailor being bound to do his utmost independently of any fresh contract. Stilk v. Myrick, 2 Camp. 317, and the cases there cited.

It would open a door to profligacy, chicanery, and corruption, if the officers appointed to carry out the criminal law were permitted to stipulate by private contract; it would open a door to the escape of offenders by culpable supineness and indifference on the part of those officers, and compel the injured persons to take upon themselves the burden of public prosecutions. It ought not to be permitted. Constables must do their utmost to discover, pursue, and arrest offenders within their township, district, or jurisdiction, without other fee or reward than that given by the law itself.

Judgment reversed, and a venire de novo awarded.1

(γ) Promise to perform existing contract.

COYNER v. LYNDE.

10 INDIANA, 282. -- 1858.

Hanna, J. The appellant was the plaintiff, and the appellees the defendants. The plaintiff was a contractor with the Rich-

¹ In McCandless v. Alleghany Bessemer Steel Co. (152 Pa. St. 139 [1893]) a sheriff recovered money expended by him for expense of deputies selected by him at request of defendants, for their special benefit, and upon the faith of their promise to make good the amount thus advanced.

mond and Newcastle Railroad Company, for the construction of a portion of said road. The defendants undertook, and agreed with the plaintiff, to complete a portion of that contract, to wit, to grade the road, for which they were to receive from the company the same rates per yard, etc., that the plaintiff was to have received, and said defendants were to pay the plaintiff a certain portion of the sum so received, to wit, so much per yard, etc., as a premium, or for the privilege of said contract. This suit is for that sum, which was to have been thus paid by defendants to plaintiff.

The court overruled the demurrer to the sixth paragraph of the defendants' answer, and gave and refused certain instructions directed to the points involved in that paragraph. Of these rulings the plaintiff complains.

The sixth paragraph is, in substance, that after the plaintiff and defendants had entered into the agreement sued on, it was ascertained that the prices at which plaintiff had undertaken with the company to do the work were greatly inadequate; that it would be a losing business to prosecute the work; that upon such discovery, the defendants determined to abandon the contract, and leave the plaintiff to perform it; that the plaintiff, knowing he would suffer loss to complete the same himself at the prices, "in view of said facts, and to induce the defendants to go on with said work, and not throw the same on the hands of said plaintiff, he, said plaintiff, agreed that if said defendants would agree to continue to prosecute said work to final completion, and procure additional and extra pay from said company, which, with the amount agreed to be paid plaintiff, would enable them to complete said work, and save him from prosecuting the same, he, the said plaintiff, then and there agreed to release and acquit them from said payment," etc.; that relying on this promise, and an agreement of the company to pay them an additional compensation, they completed said work.

It is insisted by the plaintiff that there was not, nor is there alleged to be, any consideration for this new promise, and it was therefore void; whilst, by the defendants, it is argued that the contract was, in effect, abandoned, and the work afterwards resumed because of the new promise, and that such resumption

of work was a sufficient consideration for the new agreement to pay a different sum, to wit, the whole, instead of a part, of the original contract price.

Whether the contract between the plaintiff and the defendants was abandoned or not by the defendants, was a question to which the attention of the jury was fairly called by the instructions, and the law stated to them upon such a state of facts, if found. Under these circumstances, we cannot disturb their finding, especially as the whole evidence is not in the record. *Mills* v. *Riley*, 7 Ind. R. 138.

• From the verdict of the jury, it is evident that they must have come to the conclusion that the contract had been abandoned. it was abandoned, the plaintiff had his election, either to sue the defendants for non-performance, or to obtain the completion of the work by a new arrangement. If, in making such new arrangement or agreement, new or additional promises were made to the defendants dependent upon the completion of the work, and the defendants, in consideration of such promises, completed the work, we do not see anything to prevent such promises from being binding. Munroe v. Perkins, 9 Pick. 302; 14 Johns. 330. new agreement might embrace in its terms, and definitely or by legitimate implication dispose of, any right of action which the plaintiff had, under the previous contract, against the defendants for failure to perform, or for portions of the sum due for work done, so far as it had progressed. 4 Ind. R. 75; 7 Id. 597. Whether a new agreement was made, and if so, whether the defendants were absolved thereby from the payment of the bonus previously agreed upon, were also questions of fact for the jury, and were, so far as we can see, properly submitted to them, and we cannot disturb their verdict thereon.

In the case cited in 14 Johns, the plaintiff undertook, by agreement under seal, to construct a certain cart-way for the sum of \$900. After progressing with the work, he ascertained that the price was inadequate, and determined to abandon the contract; whereupon the defendant agreed verbally to release him from the contract and pay him by the day if he would complete the work, which he did; and in a suit for work and labor, the second contract was considered binding. So the case in 9 Pickering was

for work and labor, etc., in the erection of a hotel. Defense, a special contract, etc. Reply, waiver of the contract, and new promise, etc. And although, so far as can be gathered from the opinion, the evidence of an abandonment of the original contract was not by any means strong, yet the verdict of the jury is adverted to as settling that question. See also 7 Ind. R. 138.

As the evidence is not in the record, the presumption which we have often decided would arise in reference to instructions given and refused, would prevent us from saying that the instructions given in this case were improper; and so, also, as to the ruling of the court in refusing those that were asked. 9 *Ind. R.* 115; *Id.* 230; *Id.* 286; 8 *Id.* 502; 7 *Id.* 531.

Per Curiam. The judgment is affirmed with costs.1

ENDRISS v. BELLE ISLE ICE CO.

49 MICHIGAN, 279.-1882.

Assumpsit. Plaintiff brings error.

GRAVES, C. J. The ice company agreed with plaintiff, who is a brewer, to furnish him with the ice he would require for his brewery during the season of 1880 at \$1.75 per ton, or in case of scarcity, \$2 per ton. The parties proceeded under the contract until May, at which time the ice company refused further performance and so notified the plaintiff. Shortly afterwards the parties arranged that the ice company should furnish ice at \$5 per ton; but this was soon modified by reducing the price to \$4 per ton. This arrangement, it seems, was carried out. The plaintiff, however, brought this suit to recover damages for the breach of the original contract, and his contention was that when the ice company broke that contract the law made it his duty to use reasonable efforts to mitigate the damages, and hence to provide himself with ice on the best practicable terms, and without regard to the individuality of the party of whom it could or might be obtained, and that acting in accord-

¹ Accord: Stewart v. Keteltas, 36 N.Y. 388; Thomas v. Barnes, 156 Mass. 581; Osborne v. O'Reilly, 42 N. J. Eq. 467; Moore v. Detroit Loc. Works, 14 Mich. 266.

ance with that duty, he made a new contract with the ice company, and one wholly distinct from that which the company refused to perform, at \$4, and without waiving or impairing his right to hold the ice company for its violation of the original contract.

The ice company claimed, on the other hand, that the second arrangement was merely a modification by consent of the first, and that it left open no ground of action on account of the refusal of the company to perform the contract as it was originally made.

The trial judge was of opinion that the evidence was all one way, and that it afforded no room for argument in favor of the position of the plaintiff, and he ordered a verdict for the defendant. We are not able to concur in this view.

We think the circumstances raised a question for the jury, and that it should have been left to them to construe and weigh the evidence, and at length decide between the conflicting theories. Goebel v. Linn (47 Mich. 489) has no application. The suit there was on a note, and the question was on the existence of legal consideration, and whether the defense of duress was compatible with admitted facts.

The jndgment should be reversed with costs and a new trial granted.

The other Justices concurred.1

LINGENFELDER et al. Executors v. WAINWRIGHT BREWING CO.

103 MISSOURI, 578. - 1890.

Appeal from St. Louis City Circuit Court.

Action by the executors of Jungenfeld for services performed by him. Jungenfeld, an architect, was employed by defendants to plan and superintend the construction of brewery buildings. He was also president of the Empire Refrigerating Company, and largely interested therein. The De La Vergne Ice Machine Company was a competitor in business. Against Jungenfeld's

 1 See Rogers v. Rogers, 139 Mass. 440. Cf. Widiman v. Brown, 83 Mich. 241.

wishes Wainwright awarded the contract for the refrigerating plant to the De La Vergne Company. The brewery was at that time in process of erection and most of the plans were made. When Jungenfeld heard that the contract was awarded, he took his plans, called off his superintendent on the ground, and notified Wainwright that he would have nothing more to do with the brewery. The defendants were in great haste to have their new brewery completed for divers reasons. It would be hard to find an architect in Jungenfeld's place, and the making of new plans and arrangements when another architect was found would involve much loss of time. Under these circumstances Wainwright promised to give Jungenfeld five per cent on the cost of the De La Vergne ice machine if he would resume work. Jungenfeld accepted, and fulfilled the duties of superintending architect till the completion of the brewery.

GANTT, P. J. . . . Was there any consideration for the promise of Wainwright to pay Jungenfeld five per cent on the refrigerator plant? If there was not, plaintiff cannot recover the \$3449.75, the amount of that commission. The report of the referee, and the evidence upon which it is based, alike show that Jungenfeld's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenfeld, to complete his original contract under its original terms.

It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise he was not to do anything more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new that Jungenfeld was bound to tender under the original contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of five per cent on the refrigerator plant, on the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part.

Jungenfeld himself put it upon the simple proposition, that "if he, as an architect, put up the brewery, and another company put up the refrigerator machinery, it would be a detriment to the Empire Refrigerating Company," of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts, that they may profit by their own wrong.

"That a promise to pay a man for doing that which he is already under contract to do is without consideration," is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various States that nothing but the most cogent reasons ought to shake it. Harris v. Carter, 3 E. & B. 559; Stilk v. Myrick, 2 Camp. 317; 1 Chitty on Contracts (11 Amer. ed.), 60; Bartlett v. Wyman, 14 Johns. 260; Reynolds v. Nugent, 25 Ind. 328; Ayres v. Railroad, 52 Iowa, 478; Festerman v. Parker, 10 Ired. 474; Eblin v. Miller, 78 Ky. 371; Sherwin & Co. v. Brigham, 39 Ohio St. 137; Overdeer v. Wiley, 30 Ala. 709; Jones v. Miller, 12 Mo. 408; Kick v. Merry, 23 Mo. 72; Laidlou v. Hatch, 75 Ill. 11; Wimer v. Overseers of the Poor, 104 Penn. St. 317; Cobb v. Cowdery, 40 Vermont, 25; Vanderbilt v. Schreyer, 91 N. Y. 392.

But "it is carrying coals to New Castle" to add authorities on a proposition so universally accepted and so inherently just and right in itself. The learned counsel for respondents do not controvert the general proposition. Their contention is, and the Circuit Court agreed with them that, when Jungenfeld declined to go further on his contract, the defendant then had the right to sue for damages, and not having elected to sue Jungenfeld, but having acceded to his demand for the additional compensation, defendant cannot now be heard to say his promise is without consideration. While it is true Jungenfeld became liable in damages for the obvious breach of his contract, we do not think it follows that defendant is estopped from showing its promise was made without consideration.

It is true that as eminent a jurist as Judge Cooley, in Goebel v. Linn (47 Michigan, 489), held that an ice company which had

agreed to furnish a brewery with all the ice they might need for their business from November 8, 1879, until January 1, 1881, at \$1.75 per ton, and afterwards in May, 1880, declined to deliver any more ice unless the brewery would give it \$3 per ton, could recover on a promissory note given for the increased price. Profound as is our respect for the distinguished judge who delivered that opinion, we are still of the opinion that his decision is not in accord with the almost universally accepted doctrine and is not convincing, and certainly so much of the opinion as holds that the payment by a debtor of a part of his debt then due would constitute a defense to a suit for the remainder is not the law of this State, nor do we think of any other where the common law prevails.

The case of Bishop v. Busse (69 III. 403) is readily distinguishable from the case at bar. The price of brick increased very considerably, and the owner changed the plan of the building so as to require nearly double the number; owing to the increased price and change in the plans, the contractor notified the party for whom he was building, that he could not complete the house at the original prices, and, thereupon, a new arrangement was made, and it is expressly upheld by the court on the ground that the change in the buildings was such a modification as necessitated a new contract. Nothing we have said is intended as denying parties the right to modify their contracts, or make new contracts, upon new or different considerations and binding themselves thereby.

What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and although by taking advantage of the necessities of his adversary he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong.

So holding, we reverse the judgment of the Circuit Court of St. Louis, to the extent that it allow the plaintiffs below, respondents here, the sum of \$3449.75, the amount of commission at five per cent on the refrigerator plant; and, at the request of both sides, we proceed to enter the judgment here, which, in our opinion, the Circuit Court of St. Louis should have entered, and

accordingly it is adjudged that the report of the referee be in all things approved, and that defendant have and recover of plaintiffs as executors of Edmund Jungenfeld the sum of \$1492.17 so found by the referee with interest from March 9, 1887. All the judges of this division concur.¹

JOHNSON'S ADM'R v. SELLERS' ADM'R.

33 ALABAMA, 265. — 1858.

Appeal from the Circuit Court of Wilcox.

Johnson contracted to teach school at Camden, the trustees of the school understanding that he also engaged to bring his wife with him as a teacher. Johnson contended that he did not consider that he had made a contract to bring her. The evidence tended to show that thereafter Sellers agreed to pay Johnson \$2500 if he would bring Mrs. Johnson with him to teach at Camden.

Walker, J. The counsel for the appellant only contends, that the first, fourth, ninth, and tenth charges given are erroneous; and we will, therefore, confine our attention to them. Upon the first charge it is not necessary that we should pass, as the question made upon it will not probably again arise.

- (1.) The court erred in giving the fourth charge. The contracting parties are not bound beyond the stipulations of the contract. One of the parties is not bound to perform an act, not within the stipulations of the contract, because it was understood by the other party that he would perform it, and he knew of that understanding. The effect of the charge was, to hold Johnson bound to bring his wife with him, although he did not contract to do so, because it was known to him that the trustees understood that he was to bring her with him to teach in the school. In the giving of that charge the court erred. Sanford v. Howard, 29 Ala. 684.
- (2.) The ninth and tenth charges assert the proposition, that if Johnson contracted to bring and associate his wife with him in teaching the school, and then refused to comply with that contract, a promise by Sellers to give him \$2500, in order to induce

¹ See Goldsborough v. Gable, 140 Ill. 269.

him to comply, would be without consideration. In our judgment, these charges are correct. Johnson, by his contract, was legally bound to bring his wife to teach in the school, if the contract was such as the charge supposes. He had no right to violate that contract, and compensate the injured party in damages. It is true, the law would not interpose to compel the performance of the contract; but this is not because he had a right to violate his contract, but because the law supposes the injury done by the violation of it can be sufficiently compensated in damages. A man may commit a trespass, for which the law would merely give an action to recover damages; but it does not therefore follow, that he had a right to commit the trespass, being responsible for the damages, or that a promise made to induce him either to commit or not to commit it would be valid. Renfro v. Heard, 14 Ala. 23.

If two parties make a contract, one of them may waive the performance of the contract by the other, and assume some new and additional obligation as the consideration of the performance by the other. Such obligation would be binding. Within this principle fall the cases of Stoudenmeier v. Williamson, 29 Ala. 558; Munroe v. Perkins, 9 Pick. 298; and Lattimore v. Harsen, 14 Johns. 330; also, Spangler v. Springer, 22 Penn. St. R. 454; Whiteside v. Jennings, 19 Ala. 784; Thomason v. Dill, 30 Ala. 444. Those cases rest upon the ground, that it is competent for the parties to a contract to modify or rescind it, or to waive their rights growing out of it as originally made, and engraft upon it new terms. Here, while there is a subsisting contract with the trustees, and a subsisting obligation to perform it, the proposition of the appellant is, that a promise by a third party to induce its performance, or rather to prevent its breach, was supported by a valid consideration. We do not think the law so regards such a promise.

We deem it proper to remark, that the testimony found in the bill of exceptions does not conclusively show whether Johnson's contract was to bring his wife to teach in the school with him; and that that question of fact should be left to the determination of the jury upon the evidence. The court could not assume that the resolution for the election of Johnson as principal on the 17th August, 1850, contains all the terms of the contract. The question, what was the contract, must be left to the decision of the jury, upon that and the other evidence in the case.

The judgment of the court below is reversed, and the cause is remanded.¹

(8) Payment of smaller sum in satisfaction of larger.

JAFFRAY v. DAVIS.

124 NEW YORK, 164.-1891.

Potter, J. The facts found by the trial court in this case were agreed upon. They are simple and present a familiar question of law. The facts are that defendants were owing plaintiffs on the 8th day of December, 1886, for goods sold between that date and the May previous at an agreed price, the sum of \$7714.37, and that on the 27th of the same December, the defendants delivered to the plaintiffs their three promissory notes, amounting in the aggregate to three thousand four hundred and sixty-two twenty-four one-hundredths dollars secured by a chattel mortgage on the stock, fixtures, and other property of defendants, located in East Saginaw, Michigan, which said notes and chattel mortgage were received by plaintiffs under an agreement to accept same in full satisfaction and discharge of said indebtedness. "That said notes have all been paid and said mortgage discharged of record."

The question of law arising from these facts and presented to this court for its determination is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of

¹ Accord: Davenport v. First Congregational Society, 33 Wis. 387; Schuler v. Myton, 48 Kans. 282; Brownlee v. Lowe, 117 Ind. 420; Robinson v. Jewett, 116 N. Y. 40.

Contra: abbig to v. Dother 163 Klass. 433

the balance of the debt. This single question was presented to the English court in 1602, when it was resolved (if not decided) in Pinnel's case (5th Co. R. 117) "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honestv. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than as held in Pinnel's case, supra, and Cumber v. Wane, 1 Str. 426. Foakes v. Beer, L. R. 9 App. Cas. 605; 36 English Reports, 194; Goddard v. O'Brien, L. R. 9 Q. B. Div. 37; Vol. 21, Am. Law Register, 637, and notes.

The steadfast adhesion to this doctrine by the courts in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations, demonstrates the force of the doctrine of stare decisis. But the doctrine of stare decisis is further illustrated by the course of judicial decisions upon this subject; for while the courts still hold to the doctrine of the Pinnel and Cumber v. Wane cases, supra, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or in other words, to extract if possible from the circumstances of each case a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the court to settled law and at the same time enable us perhaps more satisfactorily to decide whether there was a good consideration to support the agreement in this case, to refer to the consideration, in a few of the numerous cases, which the courts have held to be sufficient to support the new agreement.

Lord Blackburn said in his opinion in Foakes v. Beer, supra,

and while maintaining the doctrine, "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk or robe, etc., in satisfaction is good," quite regardless of the amount of the debt. And it was further said by him in the same opinion, "that payment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time," "and so if I am bound in twenty pounds to pay you ten pounds at Westminster, and you request me to pay you five pounds at the day at York, and you will accept it in full satisfaction for the whole ten pounds. it is a good satisfaction." It was held in Goddard v. O'Brien (L. R. 9 Q. B. Div. 37; 21 Am. L. Reg. N. S. 637): "A, being indebted to B in 125 pounds 7s. & 9d. for goods sold and delivered, gave B a check (negotiable, I suppose) for 100 pounds payable on demand, which B accepted in satisfaction, was a good satisfaction." Huddleston, B., in Goddard v. O'Brien, supra, approved the language of the opinion in Sibree v. Tripp (15 M. & W. 26), "that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing and more advantageous than the original debt which was not negotiable."

It was held in *Bull* v. *Bull* (43 Conn. 455), "and although the claim is a money demand liquidated and not doubtful, and it cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good no matter what the value."

And it was held in *Cumber* v. *Wane*, *supra*, that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum*, but if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.

It was held in Le Page v. McCrea (1 Wend. 164) and in Boyd v. Hitchcock (20 Johns. 76) that "giving further security for part of a debt or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction."

That "if a debtor gives his creditor a note indorsed by a third party for a less sum than the debt (no matter how much less), but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." Varney v. Conery, 3 East R. 25. And so it has been held, "where by mode or time of part payment, different than that provided for in the contract, a new benefit is or may be conferred or a burden imposed, a new consideration arises out of the transaction and gives validity to the agreement of the creditor" (Rose v. Hall, 26 Conn. 392), and so "payment of less than the whole debt, if made before it is due or at a different place from that stipulated, if received in full, is a good satisfaction." Jones v. Bullitt, 2 Lit. 49; Ricketts v. Hall, 2 Bush. 249; Smith v. Brown, 3 Hawks. (N. C.) 580; Jones v. Perkins, 29 Miss. 139; Schweider v. Lang, 29 Minn. 254; 43 Am. R. 202.

In Watson v. Elliott (57 N. H. 511-513) it was held, "it is enough that something substantial, which one party is not bound by law to do, is done by him or something which he has a right to do he abstains from doing at the request of the other party," [and this] is held a good satisfaction.

It has been held in a number of cases that if a note be surrendered (by the payee to the maker), the whole claim is discharged and no action can afterwards be maintained on such instrument for the unpaid balance. Ellsworth v. Fogg, 35 Vt. 355; Kent v. Reynolds, 8 Hun, 559.

It has been held that a partial payment made to another, though at the creditor's instance and request, is a good discharge of the whole debt. *Harper* v. *Graham*, 20 Ohio, 106. "The reason of the rule is that the debtor in such case has done something more than he was originally bound to do, or at least something different. It may be more or it may be less, as a matter of fact."

It was held by the Supreme Court of Pennsylvania in *Mechanics' Bank* v. *Huston* (Feb. 13, 1882, 11 W. Notes of Cases, 389), the decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market, etc., was held to fur-

nish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable.

It has been held that a payment in advance of the time, if agreed to, is full satisfaction for a larger claim not yet due. Brooks v. White, 2 Met. 283; Bowker v. Childs, 3 Allen, 434.

In some States, notably Maine and Georgia, the legislature, in order to avoid the harshness of the rule under consideration, have by statute changed the law upon that subject by providing, "no action can be maintained upon a demand which has been cancelled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration however small." Citing Weymouth v. Babcock, 42 Maine, 42.

And so in *Gray* v. *Barton* (55 N. Y. 68), where a debt of \$820 upon book account was satisfied by the payment of \$1 by calling the balance a gift, — though the balance was not delivered except by fiction, and the receipt was in the usual form and was silent upon the subject of a gift; and this case was followed and referred to in *Ferry* v. *Stephens*, 66 N. Y. 321.

So it was held in *Mitchell* v. *Wheaton* (46 Conn. 315; 33 Am. R. 24) that the debtor's agreement to pay and the payment of \$150 with the costs of the suit upon a liquidated debt of \$299 satisfied the principal debt.

These cases show in a striking manner the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the old law," as it is characterized in *Johnston* v. *Brannan* (5 Johns. 268-272), or as it is called in *Kellogg* v. *Richards* (14 Wend. 116), "technical and not very well supported by reason," or as may be more practically stated, a rule that "a bar of gold worth \$100 will discharge a debt of \$500, while 400 gold dollars in current coin will not." See note to *Goddard* v. *O'Brien*, supra, in *Am. Law Register*, New Series, Vol. 21, pp. 640, 641.

The state of the law upon this subject, under the modification of later decisions both in England and in this country, would seem to be as expressed in Goddard v. O'Brien (Queen's Bench Division, supra): "The doctrine in Cumber v. Wane is no doubt very much qualified by Sibree v. Tripp, and I cannot find it better stated than in 1st Smith's Leading Cases (7th ed.), 595:

'The general doctrine in Cumber v. Wane, and the reason of all the exceptions and distinctions which have been engraved on it, may perhaps be summed up as follows, viz.: That a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being nudum pactum. But if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale and render the consideration sufficient to support the agreement.'" Bull v. Bull, 43 Conn. 455; Fisher v. May, 2 Bibb. 449; Reed v. Bartlett, 19 Pick. 273; Union Bank v. Geary, 5 Peters, 99-114; Le Page v. McCrea, 1 Wend. 164; Boyd v. Hitchcock, 20 Johns. 76; Brooks v. White, 2 Metc. 283; Jones v. Perkins, 29 Miss. 139-141; Hall v. Smith, 15 Iowa, 584; Babcock v. Hawkins, 23 Vt. 561.

In the case at bar the defendants gave their promissory notes upon time for one-half of the debt they owed plaintiffs, and also gave plaintiffs a chattel mortgage on the stock, fixtures, and other personal property of the defendants under an agreement with plaintiffs, to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiffs then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was by the parties substituted in place of the former. The consideration of the new agreement was that the plaintiffs, in place of an open book account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiffs perhaps the trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security.

It was some trouble, at least, and perhaps some expense to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions or the power of disposing of this property, and gave the plaintiffs such ownership as against the defendants, and the claims thereto of defendants' creditors, if there were any.

It seems to me, upon principle and the decisions of this State

(save, perhaps, Keeler v. Salisbury, 33 N. Y. 653, and Platts v. Walrath, Lalor's Supp. 59, which I will notice further on), and of quite all of the other States, the transactions between the plaintiffs and the defendants constitute a bar to this action. is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in the opinion of Judge Andrews in Allison v. Abendroth (108 N. Y. 470), from which I quote: "But it is held that where there is an independent consideration. or the creditor receives any benefit or is put in a better position. or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not nudum pactum, and the doctrine of the common law to which we have adverted has no application." Upon this distinction the cases rest which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction, as, for example, a negotiable instrument binding the debtor and a third person for a smaller sum. Curlewis v. Clark, 3 Exch. 375. Following the same principle, it is held that when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction if so agreed. The case of accepting the sole liability of one of two joint debtors or copartners in satisfaction of the joint or copartnership debt is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors "may be more beneficial than the joint liability of both, either in respect of the solvency of the parties, or the convenience of the remedy." Thompson v. Percival, 5 B. & Adol. 925. perfect accord with this principle is the recent case in this court of Luddington v. Bell (77 N. Y. 138), in which it was held that the acceptance by a creditor of the individual note of one of the members of a copartnership after dissolution for a portion of the copartnerhsip debt was a good consideration for the creditor's agreement to discharge the maker from further liability. dee v. Wood, 8 Hun, 584; Douglass v. White, 3 Barb. Chy. 621-624.

Notwithstanding these later and decisive authorities, the plaintiffs contend that [despite] the giving of the defendants' notes with the chattel mortgage security and the payment, such consideration was insufficient to support the new or substituted agreement, and cites as authority for such contention the cases of *Platts* v. *Walrath* (Lalor's Supp. 59) and *Keeler* v. *Salisbury* (33 N. Y. 648).

Platts v. Walrath arose in justice court, and the debt in controversy was put forth as a set-off. The remarks of the judge in the former case were quite obiter, for there were various subjects in dispute upon the trial, and from which the justice might have reached the conclusion that he did. The judge in the opinion relied upon says: "Looking at the loose and secondary character of the evidence as stated in the return, it was perhaps a question of fact whether any mortgage at all was given; or, at least, whether, if given, it was not in terms a mere collateral security for the large note," "even the mortgagee was left to parol proof. Did it refer to and profess to be a security for the note of \$1500, or that sum less the fifty dollars agreed to be thrown off, etc., etc.?"

There is so much confusion and uncertainty in the case that it was not thought advisable to publish the case in the regular series of reports. The case of Keeler v. Salisbury, supra, is not to be regarded as an authority upon the question or as approving the case of Platts v. Walrath, supra. In the case of Keeler v. Salisbury, the debtor's wife had joined in the mortgage given by her husband, the debtor, to effect the compromise, thus releasing her inchoate right of dower. The court held that fact constituted a sufficient consideration to support the new agreement, though the court in the course of the opinion remarked that it had been held that the debtor's mortgage would not be sufficient, and referred to Platts v. Walrath. But the court did not otherwise indicate any approval of that case, and there was no occasion to do so, for, as before stated, the court put its decision upon the fact that the wife had joined in the mortgage.

In view of the peculiar facts in these two cases and the numerous decisions of this and other courts hereinbefore referred to, I do not regard them as authorities against the defendants' contention that the plaintiffs' action for the balance of the original

debt is barred by reason of the accord and satisfaction, and that the judgment should be reversed, with costs. All concur.

Judgment reversed.

(ϵ) Composition with creditors.

WILLIAMS v. CARRINGTON.

1 HILTON (N. Y. C. P.), 515. - 1857.

Action for debt. Defense, accord and satisfaction by composition. Appeal from judgment of Marine Court in favor of plaintiff.

Defendant having made a composition with several of his creditors at forty cents on the dollar, made a similar agreement with plaintiffs by which he agreed to pay them forty cents on the dollar, and did pay them such amount, and received a receipt in full of their account. Defendant at the same time gave to plaintiffs a sealed instrument by which he bound himself to pay to them an additional forty per cent as soon as his compromise should be effected, on condition that plaintiffs sign a paper purporting to compromise his indebtedness to them for forty per cent. The composition was never completed, and plaintiffs bring this action. There was no evidence that plaintiffs ever executed a composition deed, or that other creditors were induced to enter into a compromise in consequence of the agreement with plaintiffs.

Daly, J. It was essential, in this case, to show that other creditors had consented to accept the forty per cent in discharge of their claims in consequence of the plaintiffs' consenting to do so. The consideration which supports such an agreement, when it is not under seal, is the mutual understanding, among all who become parties to it, that each is to take the composition agreed upon, and forbear further to press or insist upon their claims. It is said in Good v. Cheesman (2 Barn. & Adolph. 328), by Lord Tenterden, "that a creditor shall not bring an action where others have been induced to join him in a composition with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract

with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims." It must appear that the act of the plaintiff, in accepting the forty per cent, operated as an inducement to other creditors to do the same, otherwise it is but the acceptance of a lesser sum for a Thus in Lowe v. Equitar greater, which is no satisfaction. (7 Price, 604) the plaintiff agreed with the defendant to execute a deed of composition with the other creditors, and take the benefit of the composition with them, in consideration that the defendant would also deliver to him a picture of the value of The picture was delivered and accepted by the plaintiff in full satisfaction of his claim, and the defendant and all the other creditors, except the plaintiff, signed the composition deed. The plaintiff sued for the original debt, and a plea setting up these facts was held to be no bar. I am inclined to think, from the report of this case, that the picture was accepted in lieu of, or as a payment of the composition, and if so, it was a case, in its essential features, like the present. Where creditors meet together, and the terms of the composition are arranged, as was the case in Cockshott v. Bennett (2 Term Rep. 763), or as in Good v. Cheesman, supra, put their names to an agreement or memorandum of the term, all the creditors present at such meeting, or all who sign the writing, enter into a mutual engagement, each with the other, to accept the amount proposed by way of compromise, and to forbear further to insist upon their claims. Where creditors thus mutually agree with each other, the beneficial consideration to each creditor is the engagement of the rest to forbear. A fund is thereby secured for the general advantage of all; and if any one of the parties were allowed afterwards to enforce his whole claim, it would operate to the detriment of the other creditors who have relied upon his agreement to forbear, and might even deprive them of the sum it was mutually agreed they should receive, by putting it out of the power of the debtor to carry out the composition. I know of no case, however, in which an acceptance, by a creditor from his debtor, of a certain sum in discharge of his debt, where other creditors have done the same, has been held to be a satisfaction, unless there was something in the case to show that the other creditors acted with the knowledge of his concurrence, and it could be assumed that their agreement necessarily contemplated and was founded in the benefit and advantage to be derived from his agreement also to forbear—in the language of Lord Tenterden, that they "were induced to join him in the composition." It is very probable, in this case, that such was the fact—very probable that the plaintiffs signed the composition, but nothing of the kind appears in the evidence. For all that appears in the testimony, the other creditors may have accepted the forty per cent without knowing that the plaintiffs had received that sum, or had agreed to accept it. We would not be justified in presuming, upon this evidence, that they did, against what must be regarded as a direct finding by the judge below, that they did not. We would have to hold that the judgment he gave was against evidence, and we could not, I think, go that length.

The judgment must be affirmed; but as the question is not very fully discussed by either party upon the written argument submitted, and as it is of a good deal of practical importance, I think the defendant should be allowed, if he wishes it, to carry the case to the Court of Appeals.

[Ingraham, F. J., also read for affirmance.] Brady, J., dissented.

Judgment affirmed.

PERKINS v. LOCKWOOD. -

100 MASSACHUSETTS, 249. - 1868.

Action on a promissory note upon which was the following indorsement:

"December 14, 1864. Received on the within note \$10.38, being the first instalment towards \$15.94, being ten per cent of said note, which when paid is to be in full satisfaction and settlement of the within note, provided that no other creditor shall receive more than ten per cent on his claim against Lockwood & Connell, and provided also that if any creditor shall receive more than ten per cent, an amount equal to such percentage shall be paid on the within note."

Wells, J. An agreement to accept, in satisfaction and discharge of a liquidated debt, a sum less than the full amount due,

is not valid, unless there exist some consideration to support it other than the payment or promise of the debtor to pay such less sum. Harriman v. Harriman, 12 Gray, 341. The note or collateral promise of another person will support the agreement. Brooks v. White, 2 Met. 283. For a like reason, when such an agreement forms part of a composition in which several creditors join, mutually stipulating to withdraw or withhold suits and that they will release to their common debtor a part of their claims upon payment of a certain other part, the agreement becomes binding between each creditor and the debtor. Eaton v. Lincoln, 13 Mass. 424; Steinman v. Magnus, 11 East, 390. The reason is. that the rights and interests of other parties become involved in the arrangement, and this affords a new and legal consideration for the promise. It would be contrary to good faith for a creditor who has secured the advantage of such an arrangement to disregard its obligations by proceeding to enforce the balance of his demand; and the debtor is entitled to avail himself of this consideration in defense. Good v. Cheesman, 2 B. & Ad. 328; Boyd v. Hind, 1 H. & N. 938.

In this case, the exceptions do not show that there was any such mutual agreement between the creditors. The defense indicated by the most important ruling of the court appears to be based entirely upon the legal effect of the agreement between the plaintiff and defendant as indorsed upon the notes in suit. That agreement affects no other party. Its reference to the like settlement of other debts is merely in the nature of a condition attached to the plaintiff's promise to discharge the notes. does not make it any the more binding. The defendant's undertaking, that he would not pay others more than the plaintiff, would not prevent others from enforcing their claims in full, and is not such a promise as would afford any consideration for the agreement of the plaintiff. It is neither a benefit to the plaintiff nor disadvantage to the defendant. So far as the exceptions show, the release of their claims by the other creditors had no connection with this agreement. The agreement itself shows no legal consideration to give it effect as a contract.

As we understand the exceptions, the court below ruled that the agreement indorsed upon the notes constituted of itself "a legal

and valid contract, binding on the plaintiff." This we think was clearly wrong; and for this cause the

Exceptions are sustained.

Note. — For cases holding mutual subscriptions a sufficient consideration for each other, see Lathrop v. Knapp, 27 Wis. 214; Higert v. Indiana Asbury University, 53 Ind. 326; Christian College v. Hendley, 49 Cal. 347. Contra: Trustees v. Stewart, 1 N. Y. 581; First Pres. Ch. v. Cooper, 112 N. Y. 517; Cottage Street M. E. Ch. v. Kendall, 121 Mass. 528; University of Des Moines v. Livingstone, 57 Ia. 307.

(iii.) Consideration must be legal.

Note. — For cases on legality of consideration, see cases on "Legality of Object," post, Part II. Ch. V.

(iv.) Consideration may be executory or executed, it must not be past.

DEARBORN v. BOWMAN.

3 METCALF (Mass.), 155. - 1841.

Assumpsit on a note in these terms: "June 17, 1839. I promise to pay Dearborn & Bellows sixty dollars in ninety days, value received. Bowman." Defense, want of consideration.

Shaw, C. J. The defense to the action to recover the amount of this note is want of consideration. It is manifest from the note itself, that it is not a negotiable instrument, being payable neither to order nor to bearer; indeed, it appears by the case, that the defendant declined making it negotiable. But total want of consideration is a good defense even to an action on a negotiable note, when brought by the promisee against the maker. Then the question is, whether upon the facts shown, any consideration appears for this promise. The note was given in consequence of services before that time performed by the plaintiffs, in printing and circulating extra papers and documents, previously to an election of state senators, at which the defendant was a candidate. Such services imposed no obligation, legal or moral, on the defendant; and it would be somewhat dangerous to

hold that they created any honorary obligation on him to pay for them. Nor would it be aided in a legal view, by a previous custom, if proved, for candidates to contribute to the payment of similar expenses, whether successful or otherwise in the election.

Nor were these services performed at the request of the On the contrary, it appears by the evidence that they were performed by General Staples, chairman of the county committee, who alone was responsible for the payment, and between whom and the defendant there was no privity, nor even any communication, until long after the services had been per-The rule of law seems to be now well settled - though it may have formerly been left in doubt - that the past performance of services constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant. Wyman, 3 Pick. 207; Loomis v. Newhall, 15 Pick. 159; Dodge v. Adams, 19 Pick. 429. As the services performed by the plaintiffs were not done at the request of the defendant, as they were not done in the fulfilment of any duty or obligation resting on him, there was no consideration to convert the express promise of the defendant into a legal obligation.

Another ground, however, was taken in behalf of the plaintiffs, which was, that the discharge by the plaintiffs, of their legal demand against Staples, was a good consideration for the defendant's promise to them. If such discharge was in fact given, and given at the defendant's request, or if the defendant had promised to pay if they would discharge Staples pro tanto, and they did discharge him, it would have been a good consideration for the defendant's promise. But there is no evidence to establish the fact.

The court are of opinion that there was no legal consideration for the defendant's promise, and that no action can be maintained upon it.

Plaintiffs nonsuit.

MILLS v. WYMAN.

3 PICKERING (Mass.), 207. — 1826.

Action of assumpsit to recover compensation for the board and care of defendant's adult son who fell sick among strangers, and was provided for under these circumstances by the plaintiff, the defendant having afterwards written to the plaintiff promising to pay him for expenses incurred.

Parker, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiæ* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise, and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported,

and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a quid pro quo; and according to the principles of natural justice, the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises, therefore, have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which has been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do. generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient,

well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt, there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it. the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent

in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & Pull. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.¹

(a) Consideration moved by previous request.

HICKS v. BURHANS.

10 JOHNSON (N. Y.), 242, -1813.

In error, on certiorari, from a justice's court. B. and others brought an action of assumpsit against Hicks, before the justice. The cause was tried by a jury. The plaintiffs gave in evidence a writing dated the 16th of January, 1808, signed by the defendant and ten others, reciting that whereas the plaintiffs had, previous to the date of the writing, been in pursuit of several persons who had absconded and were in debt to the subscribers, they, the subscribers, promised to pay to the plaintiffs, or either of them, an equal proportion of all the expenses which the plaintiffs had been at, in pursuing such fugitive debtors, and also promised to pay their equal proportion of all further expenses the plaintiffs should be at in further pursuing the said persons, etc. The plaintiffs proved an account of the expenses, amounting to about one hundred and thirty-eight dollars; and that the defendant examined the account when presented to the creditors, and made no objection to it, except to a charge of twenty dollars.

The jury gave a verdict for the plaintiffs for seventeen dollars, on which the justice gave judgment.

Per Curiam. The written promise to pay, if founded on a past consideration, may be good, if the past service be laid to have been done on request; and if not so laid, a request may

- 1 "We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise."—
 Allen v. Bryson, 67 Ia. 591.
- "This court has never, when called upon, hesitated to say that a moral obligation is a sufficient consideration to support a promise to pay."—

 Mutual &c. Ass'n v. Hurst, 78 Md.—; 26 Atl. R. 956. See also Gray v. Hamil, 82 Ga. 375.

be implied from the beneficial nature of the consideration, and the circumstances of the transaction. 1 Caines' Rep. 585, 586. Here the past service consisted in an expensive pursuit, by the plaintiffs, of certain fugitive debtors, who were indebted to the defendant and others; and it appeared that the plaintiffs had exhibited their accounts, at a meeting of the creditors, and that the defendant examined them, and made no objection, except to a single item of the charges. A request, in this case, might have been implied; and we ought to intend it to have been proved upon trial. There are no formal pleadings in the case, and the return does not negative the fact of a request.

There was no other objection raised that merits notice. The judgment must be affirmed.

Judgment affirmed.

(β) Voluntarily doing what another was legally bound to do.

GLEASON v. DYKE.

22 PICKERING (MASS.), 390. - 1839.

In 1833 defendant gave a note to the Massachusetts Hospital Life Insurance Co., and a mortgage was given by him to secure the payment of the note. November 11, 1837, the defendant's equity of redemption was sold on execution to plaintiff, who on the 24th paid to the Insurance Co. the amount due on the note. The mortgage and note, both cancelled, and with a release indorsed upon the mortgage, were delivered up to the plaintiff by the company. Some days after the execution of the release, the defendant examined the note and mortgage for the purpose of ascertaining the amount due to the plaintiff, and promised the plaintiff to pay the same.

WILDE, J. There was no express proof that the note to the Massachusetts Hospital Life Insurance Company was paid at the request of the defendant; but the plaintiff relied on the promise of the defendant to pay him, made subsequently to the discharge of the mortgage. This promise, we think, is equivalent to a previous request. It comes within the well-established principle, that the subsequent ratification of an act done by a voluntary

agent of another, without authority from him, is equivalent to a previous authority. The law, it is true, will not allow a party to maintain an action for money paid to discharge the debt of another without his consent; for to allow this, would subject every debtor to the power of those who might be disposed to injure him, and who might harass him with suits, and burden him with costs, in the most unreasonable and oppressive manner. But if the debtor assents to the payment, the reason of the law fails; and whether the consent be given before or after the payment is, as it seems to us, immaterial. Yelv. (Metcalf's ed.) 42, note. We have no doubt, therefore, that the defendant's promise is valid; first, because his ratification of the payment is equivalent to a previous request to pay, and the objection, that the consideration was past, cannot be maintained; and secondly. because the case shows an equitable consideration, which is sufficient to sustain an express promise. Where a man is under a moral obligation to pay a debt, which cannot be enforced by a court of law or equity, yet if he promises to pay he will be bound. As where a man promises to pay a just debt, the recovery of which is barred by the statute of limitations; or if a minor contracts a debt, but not for necessaries, and after he comes of age, promises to pay it; or if a debtor promises the assignee of a chose in action to pay him. In all such cases, and many others, the party will be bound by his promise, although before the promise the other party had no remedy either in law or equity. Hawkes v. Saunders, Cowper, 290.

There is another ground on which this action might be maintained, if there had been no express promise. The payment of the mortgage debt by the plaintiff was not merely voluntary. He was bound to pay the debt in order to secure his equitable interest in the estate. He was placed in this situation by the neglect of the defendant to pay the debt due to his creditor, who levied his execution on the equity of redemption. Under these circumstances no previous request to pay the debt, or subsequent ratification by the defendant, was required. *Child* v. *Morley*, 8 T. R. 610.

It was contended by the defendant's counsel, at the trial, that the operation of the payment of the mortgage was sufficient, under the circumstances, to constitute the plaintiff the assignee thereof, and to convey to him all the right of the original mortgagee. This right, we think, is sustained by the Revised Stat. c. 73, §§ 34, 35. But it by no means follows that the plaintiff has not a double remedy, as the mortgagee had. If the payment operated as an equitable assignment of the mortgage, it would have the same operation as to the note. If the plaintiff had a right to hold the mortgaged estate until the defendant paid the debt, then most clearly the defendant's promise is binding and obligatory, although the plaintiff had another security.

Default entered.1

(γ) Reviving agreement barred by some rule of law.

DUSENBURY, Executor, v. HOYT.

53 NEW YORK, 521. - 1873.

The action was upon a promissory note. The defendant pleaded his discharge in bankruptcy. Upon the trial, after proof of the discharge, plaintiff offered to prove subsequent promise of the defendant to pay the note. Defendant objected upon the ground that the action was upon the note, not upon the new promise. The court sustained the objection, and directed a verdict for defendant, which was rendered accordingly. Plaintiff appeals.

Andrews, J. The 34th section of the bankrupt law declares that a discharge in bankruptcy releases the bankrupt from all debts provable under the act, and that it may be pleaded as a full and complete bar to all suits brought thereon.

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted to recover his debt by suit is barred. But the debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt,

¹ Accord: Doty v. Wilson, 14 Johns. 378.

gives a right of action. It was held in Shippy v. Henderson (14 J. R. 178) that it was proper for the plaintiff, when the bankrupt had promised to pay the debt after his discharge, to bring his action upon the original demand, and to reply the new promise in avoidance of the discharge set out in the plea. The court, following the English authorities, said that the replication of the new promise was not a departure from the declaration, but supported it by removing the bar interposed by the plea, and that in point of pleading it was like the cases where the defense of infancy or the statute of limitations was relied upon. The case of Shippy v. Henderson was followed in subsequent cases, and the doctrine declared in it became, prior to the Code, the settled law. McNair v. Gilbert, 3 Wend. 344; Wait v. Morris, 6 Id. 394; Fitzgerald v. Alexander, 19 Id. 402.

The question whether the new promise is the real cause of action, and the discharged debt the consideration which supports it, or whether the new promise operates as a waiver by the bankrupt of the defense which the discharge gives him against the original demand, has occasioned much diversity of judicial The former view was held by Marcy, J., in Depuy v. Swart (3 Wend. 139), and is probably the one best supported by authority. But, after as before the decision in that case, the court held that the original demand might be treated as the cause of action, and for the purpose of the remedy, the decree in bankruptcy was regarded as a discharge of the debt sub modo only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. We are of opinion that the rule of pleading, so well settled and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy. The objection that, as no replication is now required, the pleadings will not disclose the new promise, is equally applicable where a new promise is relied upon to avoid the defense of infancy or the statute of limitations, and in these cases the plaintiff may now, as before the Code, declare upon the original demand. Esselstyn v. Weeks, 12 N. Y. 635.

The offer of the plaintiff to prove an unconditional promise by the defendant, after his discharge, to pay the debt, was improperly overruled, and the judgment should, for this reason, be reversed, and a new trial ordered, with costs to abide the event.

All concur, except Folger, J., not voting.

Judgment reversed.

SHEPARD v. RHODES.

7 RHODE ISLAND, 470. - 1863.

Assumpsit. Demurrer to declaration.

Bullock, J. The count demurred to states, in substance, that the plaintiffs had discharged the defendants from a certain debt, then due and owing from them to the plaintiffs, in consideration of dividends to be received from the proceeds of certain effects assigned by the defendants; and that, subsequent to such discharge, the defendants feeling themselves honorably bound to pay to the plaintiffs this debt, in consideration thereof and of one dollar to them paid, made the following new promise, to wit, to pay to the plaintiffs in one year after a final dividend, any difference that might exist between their full debt and interest and the amount of any dividend or dividends the plaintiffs might have previously received. The count further states, that more than one year has elapsed since the plaintiffs received notice that no dividend would be paid them from the assigned effects.

This statement of the cause of action shows, in effect, two separate and distinct considerations, as the foundation of the *new* promise: *first*, a *moral* consideration, that the defendants, notwithstanding their discharge, felt themselves in honor bound to pay the plaintiffs' debt; and, *second*, the *valuable* consideration of one dollar, paid to the defendants by the plaintiffs when the new promise was made.

Are these considerations, as stated, sufficient in law to sustain the promise? Passing by the earlier cases, referred to at length in a note to the report of Wennall v. Adney (3 Bos. & Pull. 249), and some of which hold to the opposite, it may now be deemed settled, that no action can be maintained upon a promise founded upon a mere moral consideration. Mills v. Wyman, 3 Pick. 207; Eastwood v. Kenyon, 11 Ad. & Ell. 438; Beaumont v. Reeve, 8

Ad. & Ell. (N. S.) 483; S. C. 55 Eng. C. L. 483. It has been said, that such a doctrine is not creditable to the common law; but the rule has its origin in the widely diversified character of moral duties, and the consequent difficulty of measuring them with exactness, and determining which are so high and obligatory in their nature as to demand, in their performance, the payment of money.

There is a class of cases which for the most part have been regarded as not falling within the rule, that a mere moral consideration will not support a promise. Of such is the case of a promise barred by the statute of limitations, where the party is under no legal liability to pay when the promise is made. And so, of the promise of an infant, made after he becomes of age, to pay a debt incurred during his minority, and which debt he is then at liberty to ratify or avoid. Upon the same principle, a promise to pay a debt originally usurious, where usury avoids the contract, but freed from all usury at the time the new promise is made, is binding, because the original contract is not void, but voidable only at the election of the borrower. And so, the promise of a bankrupt, made after certificate of discharge granted may be enforced, although now, in England, by statute (6 Geo. IV. c. 16) the promise must be in writing. But it is settled, that such considerations as love, friendship, natural affection, even the close relation existing between parent and child, are not, of themselves, sufficient to support an express promise. Whether the promise of a feme covert, after coverture ended, to pay a debt contracted during coverture, falls within the limit of the exception, has been a subject of frequent discussion, and of decisions somewhat contrariant. In Lee v. Muggeridge (5 Taunt. 36) an action was upheld against her executors, upon the bond of a feme covert, followed by her promise to pay, dum sola. But this case can hardly be deemed authority since the decision in Eastwood v. Kenyon, supra; and in New York an action was maintained against a woman, upon a contract of retainer entered into by her before a divorce. Wilson v. Burr, 25 Wend. 386. A more leading case, in the same State, affirming the validity of such a promise, is that of Goulding v. Davidson (3 Am. L. Reg. N. S. 34; 26 N.Y. 604), recently decided in the Court of Appeals. The facts were, that a feme covert represented herself as unmarried and as trading on her own account, and so procured credit, and purchased goods, for which she gave her note. Her coverture was not known to the creditor. After the death of her husband, she promised to pay this debt, and an action was brought upon this promise. The decision proceeds, mainly, upon the ground, that being guilty of fraud in the original undertaking, trover or replevin might have been brought against her and her husband at any time after the supposed purchase was made, and since this cause of action existed against her during coverture, a promise by her, after coverture, rested upon this as a sufficient consideration.

The principle recognized in, and which, almost without exception, has controlled this class of cases, is this: that when the precedent original consideration was sufficient to sustain the promise, but the right of action was suspended or barred by some positive rule of statutory or common law, the debtor might, by a subsequent promise, waive the exemption which the law has interposed indirectly for his benefit, but, mainly, from reasons of sound policy.

The case here is one where the original right of action was extinguished, not by the act of the law, but by the act of the parties. It was a voluntary release of the debt by the creditor to In Willing v. Peters (12 S. & R. 179) the question arose, how far a promise to pay a debt, thus discharged, might be enforced; and because of the analogy between waiving a discharge created by act of law and one created by act of the parties, the court upheld the action. Shaw, C. J., in Valentine v. Foster (1 Metc. 522), admits the closeness of the analogy, and suggests. if the rule be not narrow, that allows the waiver in the one case to bind the party, and rejects it in the other; but he adds, that the Pennsylvania authority is the only one he has been able to find in support of the doctrine; and in the case then before him. ruled, that when a creditor released a debtor to make him a witness, the subsequent promise of the debtor was not binding. Considering his own decision, and that the case of Willing v. Peters was subsequently overruled in the same court, in Snevily v. Read (9 Watts, 396), while in other courts it has been repeatedly adjudicated, that after the voluntary release of a debt, an express

promise does not revive it, nor does it form a sufficient consideration to support the new promise, we may affirm that such, at present, is the settled law. Warren v. Whitney, 24 Maine, 561; Stafford v. Bacon, 1 Hill, 533.

But the plaintiffs aver an additional consideration for the defendants' promise, and this raises another question; because the former consideration not being illegal, but only insufficient, the latter may sustain the promise declared upon. This additional consideration is one dollar, for which, it is alleged, the defendants promised, etc., to pay a sum greater than \$1000.

Ordinarily, courts do not go into the question of equality or inequality of considerations; but act upon the presumption that parties capable to contract are capable, as well, of regulating the terms of their contracts, granting relief only when the inequality is shown to have arisen from mistake, misrepresentation, or fraud. A different rule would, in every case, impose upon the court the necessity of inquiring into, and of determining the value of the property received by the party giving the promise. Such a course is obviously impracticable. In all cases, therefore, where the assumption or undertaking is founded upon the sale or exchange of merchandise or property, or upon other than a money consideration, and the promise has been deliberately made, the law looks no further than to see that the obligation rests upon a consideration, that is, one recognized as legal, and of some value. But the reason of the rule ceases, and hence the rule ceases, when applied to contracts to pay money and founded solely upon a money consideration. How far a forbearance to sue, or the giving of time, or the mere waiver of some right, may support a promise, we do not consider, since the question does not arise. Nor, for the like reason, do we consider how far the rule is qualified or limited by special statutes regulating interest; or in that class of contracts peculiar to the law merchant, as bottomry, respondentia, and the course of exchange. Aside from these and some other exceptions, at common law a contract for the exchange of unequal sums of money at the same time, or at different times, when the element of time is no equivalent, is not binding; and in such cases courts may and do inquire into the equality of the contract; for its subject matter, upon both sides, has not only a

fixed value, but is itself the standard of all values; and so, for the difference of value, there is no consideration. In this principle, the earliest prohibitions—earlier even than the time of Alfred—and the later legislative enactments against usury, both in England and in this country, have their origin. The rule is deemed to be founded in good policy.

In the case before us, the only legal consideration the defendants received was one dollar, for which they engaged to pay a much larger sum. The case, therefore, falls within the principle adverted to. The consideration was not only unequal, but grossly so. It was a mere nominal consideration; if even received by the defendants, it was, no doubt, regarded as such by them, and intended as such by the promisees. It was, at best, purely technical and colorable, and obviously is wanting in that degree of equitable equality sufficient to support the promise declared upon.

The demurrer to the first count is therefore sustained.

CHAPTER III.

CAPACITY OF PARTIES.

§ 1. Political status.

UNITED STATES v. GROSSMAYER.

9 WALLACE (U. S.), 72.-1869.

This case was an appeal from the Court of Claims, and was thus:

Elias Einstein, a resident of Macon, Georgia, was indebted, when the late rebellion broke out, to Grossmayer, a resident of New York, for goods sold and money lent, and while the war was in progress a correspondence on the subject was maintained through the medium of a third person, who passed back and forth several times between Macon and New York. The communication between the parties resulted in Grossmayer requesting Einstein to remit the amount due him in money or sterling exchange, or, if that were not possible, to invest the sum in cotton and hold it for him until the close of the war.

In pursuance of this direction — and, as it is supposed, because money or sterling exchange could not be transmitted — Einstein purchased cotton for Grossmayer, and informed him of it; Grossmayer expressing himself satisfied with the arrangement. The cotton was afterwards shipped as Grossmayer's to one Abraham Einstein, at Savannah, who stored it there in his own name, in order to prevent its seizure by the rebel authorities. It remained in store in this manner until the capture of Savannah, in December, 1864, by the armies of the United States, when it was reported to our military forces as Grossmayer's cotton, and taken by them and sent to New York and sold.

Grossmayer now preferred a claim in the Court of Claims for the residue of the proceeds, asserting that he was within the protection of the Captured and Abandoned Property Act. That court considering that the purchase by Elias Einstein for Grossmayer was not a violation of the war intercourse acts set forth in the preceding case, decided that he was so, and gave judgment in his favor. The United States appealed.

Mr. Justice Davis delivered the opinion of the court.

Grossmayer insists that he is within the protection of the Captured and Abandoned Property Act, but it is hard to see on what ground he can base this claim for protection. It was natural that Grossmayer should desire to be paid, and creditable to Einstein to wish to discharge his obligation to him, but the same thing can be said of very many persons who were similarly situated during the war, and if all persons in this condition had been allowed to do what was done in this case, it is easy to see that it would have produced great embarrassment and obstructed very materially the operations of the army. It has been found necessary, as soon as war is commenced, that business intercourse should cease between the citizens of the respective parties engaged in it, and this necessity is so great that all writers on public law agree that it is unlawful, without any express declaration of the sovereign on the subject.

But Congress did not wish to leave any one in ignorance of the effect of war in this regard, for as early as the 13th of June, 1861, it passed a Non-intercourse Act, which prohibited all commercial intercourse between the States in insurrection and the rest of the United States. It is true the President could allow a restricted trade, if he thought proper; but in so far as he did allow it, it had to be conducted according to regulations prescribed by the Secretary of the Treasury.

There is no pretense, however, that this particular transaction was authorized by any one connected with the Treasury Department, and it was, therefore, not only inconsistent with the duties growing out of a state of war, but in open violation of a statute on the subject. A prohibition of all intercourse with an enemy during the war affects debtors and creditors on either side, equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could

pay his debt in money, or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all the authorities. The reason why this cannot be done is obvious, for while the war lasts nothing which depends on commercial intercourse is permitted. In this case, if Einstein is to be considered as the agent of Grossmayer to buy the cotton, the act appointing him was illegal, because it was done by means of a direct communication through a messenger who was in some manner not stated in the record able to pass, during the war, between Macon and New York. It was not necessary to make the act unlawful that Grossmayer should have communicated personally with Einstein. The business intercourse through a middle man, which resulted in establishing the agency, is equally within the condemnation of the law.

Besides, if, as is conceded, Grossmayer was prohibited from trading directly with the enemy, how can the purchase in question be treated as lawful when it was made for him by an agent appointed after his own disability to deal at all with the insurgents was created?

It is argued that the purchase by Einstein was ratified by Grossmayer, and that being so, the case is relieved of difficulty; but this is a mistaken view of the principle of ratification, for a transaction originally unlawful cannot be made any better by being ratified.

In any aspect of this case, whether the relation of debtor and creditor continued, or was changed to that of principal and agent, the claimant cannot recover.

As he was prohibited during the war from having any dealings with Einstein, it follows that nothing which both or either of them did in this case could have the effect to vest in him the title to the cotton in question.

Not being the owner of the property, he has no claim against the United States.

The judgment of the Court of Claims is reversed, and the cause is remanded to that court with directions to enter an order

Dismissing the petition.1

¹ See also Kershaw v. Kelsey, 100 Mass. 561.

§ 2. Infants.

TRUEBLOOD v. TRUEBLOOD.

8 INDIANA, 195. - 1856.

Appeal from the Vigo Circuit Court.

Perkins, J. Bill in chancery. under the old practice, to compel a specific performance, and so set aside a fraudulent deed. Bill dismissed. The facts of the case, so far as material to its decision, are as follows:

In 1845, William Trueblood was an infant, and owner of a piece of land. At that date, Richard J. Trueblood, the father of said William, executed a title-bond to one Nathan Trueblood, whereby he obligated himself to cause to be conveyed to him, said Nathan, the piece of land belonging to William, after the latter should become of age. The conveyance was to be upon a stated consideration. The bond is single—simply the bond of Richard—and William is nowhere mentioned in it as a party, but his name is signed with his father's at the close of the condition, as may be supposed, in signification of his assent to the execution of the instrument by his father. We shall so treat his signature to the bond.

After William became of age, it is claimed that he ratified the bond, and afterwards sold and conveyed the land to another—Robert Lockridge—who had notice, etc. This bill was filed in order to have the deed to Lockridge set aside, and a conveyance decreed to Nathan Trueblood, pursuant to the terms of the bond.

The court below, as we have stated, refused to enter such a decree, and held, as counsel inform us, that the bond was not susceptible of ratification by William Trueblood; and whether it was or not is the important question in the case; for if the bond was not susceptible of such ratification, we need not inquire into the alleged facts which it is claimed evidence that such an act had been done.

As we have seen, the bond is not, in terms, the bond of William Trueblood. He could not, by virtue of its express provisions, be sued upon it. Where a father signs his name to articles of apprenticeship of his son, simply to signify his assent to them, he cannot be a party to a suit upon the articles. 5 Ind. R. 538.

If the bond, then, can in any light be regarded as the contract of William Trueblood, it must be because his father may be considered his agent in executing it. Can, then, an infant, after arriving at age, ratify the act of his agent, performed while he was an infant? This depends upon whether his appointment of an agent is a void or voidable act. If the former, it cannot be ratified (5 Ind. R. 353); if the latter, it can be. Reeves' Dom. Rel. 240.

In the first volume of American Leading Cases (3d ed., p. 248, et seq.) the doctrine is laid down, as the result of the American cases on the subject, that the only act an infant is incapable of performing, as to contracts, is the appointment of an agent or attorney. Whether the doctrine is founded in solid reasons, they admit, may be doubted; but assert that there is no doubt but that it is law. See the cases there collected.

The law seems to be held the same in England. In *Doe* v. *Roberts* (16 M. and W. 778), a case slightly like the present in some respects, the attorney, in argument, said: "Here a tenancy has been created, either by the children, or by Hugh Thomas, acting as their agent." Parke, B., replied: "That is the fallacy of your argument. An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act." So, here, had the bond been the personal act of the infant, he could have ratified it. It would have been simply voidable. But the bond of his agent, or one having assumed to act as such, is void, and not capable of being ratified. See 8 *Blackf*. 345.

The decree below must, therefore, be affirmed with costs. Gookins, J., having been concerned as counsel, was absent. *Per Curiam*. The decree is affirmed with costs.¹

¹ But see *Hastings* v. *Dollarhide*, 24 Cal. 195 (1864); *Hardy* v. *Waters*, 38 Me. 450 (1853), holding that the transfer by indorsement of a promissory note by the agent of an infant payee is voidable and not void.

[&]quot;From a careful examination of the modern decisions and text writers, we are satisfied that the following propositions may be regarded as settled: first, that an infant's contracts for necessaries are as valid and binding upon the infant as the contracts of an adult, and that such contracts cannot be

TRAINER v. TRUMBULL.

141 MASSACHUSETTS, 527. - 1886.

C. Allen, J. The practical question in this case is, whether the food, clothing, etc., furnished to the defendant were necessaries for which he should be held responsible. This question must be determined by the actual state of the case, and not by appearances. That is to say, an infant who is already well provided for in respect to board, clothing, and other articles suitable for his condition, is not to be held responsible if any one supplies to him other board, clothing, etc., although such person did not know that the infant was already well supplied. Angel v. McLellan, 16 Mass. 28; Swift v. Bennett, 10 Cush. 436; Davis v. Caldwell, 12 Cush. 512; Barnes v. Toye, 13 Q. B. D. 410. So, on the other hand, the mere fact that an infant, as in this case, had a father, mother, and guardian, no one of whom did anything towards his care or support, does not prevent his being bound to pay for that which was actually necessary for him when furnished. The question whether or not the infant made an express promise to pay is not important. He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay, from the necessity of his situation; just as in the case of a lunatic. 1 Chit. Con. (11th Am. ed.) 197; Hyman v. Cain, 3 Jones (N. C.), 111; Richardson v. Strong, 13 Ired. 106; Gay v. Ballou, 4 Wend. 403; Epperson v. Nugent, 57 Miss. 45, 47. In other words, he is liable to pay only what the necessaries were reasonably worth, and not what he may improvidently have agreed

disaffirmed, and need not be ratified before they can be enforced; second, the contract of an infant appointing an agent or attorney in fact is absolutely void and incapable of ratification; third, any contract that is illegal, by reason of being against a statute or public policy, is absolutely void and incapable of ratification; fourth, all other contracts made by an infant are voidable only, and may be affirmed or disaffirmed by the infant at his election when he arrives at his legal majority. The second proposition may not be founded in solid reason, but it is so held by all the authorities." Fetrow v. Wiseman, 40 Ind. 148, 155. See also Harner v. Dipple, 31 Ohio St. 72; Mustard v. Wohlford's Heirs, 15 Gratt. (Va.) 329.

to pay for them. If he has made an express promise to pay, or has given a note in payment for necessaries, the real value will be inquired into, and he will be held only for that amount. Earle v. Reed, 10 Met. 387; Locke v. Smith, 41 N. H. 346; Met. Con. 73, 75.

But it is contended that the board, clothing, etc., furnished to the defendant were not necessaries, because he, "being a pauper and an inmate of an almshouse, was supplied with necessaries suitable to his estate and condition, and, under the circumstances, it would have been the duty of the guardian to place him in the almshouse." It is true that a guardian is not obliged to provide for the support of his ward, when he has no property of the ward available for that purpose; and if he has no other resource, no doubt he may, under such circumstances, place the The authorities cited for the defendant ward in an almshouse. go no further than this. Spring v. Woodworth, 2 Allen, 206. But this by no means implies that a boy with an expectation of a fortune of \$10,000 should be brought up in an almshouse, if any suitable person will take him and bring him up properly, on the credit of his expectations. On the other hand, it seems to us highly proper for a parent or guardian, under such circumstances, to do what the father did in this case; leaving it for the boy's guardian to see to it that an unreasonable price is not paid. Looking to the advantage of his subsequent life, as well as to his welfare for the time being, his transfer from an almshouse to a suitable person, by whom he would be cared for and educated, would certainly be judicious; and the support and education furnished to an infant of such expectations, whose means were not presently available, fall clearly within the class of necessaries. In Met. Con. 70, the authority of Lord Mansfield is cited to the point that a sum advanced for taking an infant out of jail is for necessaries. Buckinghamshire v. Drury, 2 Eden, 60, 72. See also Clarke v. Leslie, 5 Esp. 28. Giving credit to the infant's expectation of property is the same as giving credit to him. There was no error in refusing to rule, as matter of law, that, upon all the facts in evidence, the action could not be maintained. The findings of all matters of fact, of course, are not open to revision.

Exceptions overruled.

912507 " See 64 Con .. 407; 30 REE , 2.53; 254 RAGI8

§ 3. Corporations.

SLATER WOOLLEN CO. v. LAMB.

143 MASSACHUSETTS, 420. - 1887.

Action upon contract for goods sold and delivered.

Contract, upon an account annexed for goods sold and delivered.

FIELD, J. If we assume that the truth of the exceptions has been established, we think that they must be overruled. The substance of the defendant's contentions is, that the Slater Woollen Company, having been incorporated "for the purpose of manufacturing fabrics of wool and worsted or of a mixture thereof with other textile materials," could not, by and in the name of persons who were in fact keeping a store as its agents, but whose agency was undisclosed, sell groceries, dry goods, and other similar articles to the defendant, who was not employed by the company, and then maintain an action against him to recover either the price or the value of the goods sold.

If the goods were the property of the plaintiff, and were sold by its agents, the plaintiff can sue as an undisclosed principal.

It was said of Chester Glass Co. v. Dewey (16 Mass. 94) in Davis v. Old Colony Railroad (131 Mass. 258, 273) that "the leading reason assigned was, 'the legislature did not intend to prohibit the supply of goods to those employed in the manufactory; ' in other words, the contract sued on was not ultra vires. That reason being decisive of the case, the further suggestion in the opinion, 'Besides, the defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused,' was, as has been since pointed out, wholly obiter dictum." But the weight of authority, we think, supports the last reason given in its application to the facts of the present case. There is a distinction between a corporation making a contract in excess of its powers, and making a contract which it is prohibited by statute from making, or which is against public policy or sound morals; and there is also a distinction between suing for the breach of an executory contract and suing to recover the value of property which has been received and retained by the defendant under a contract executed on the part of the plaintiff.

If it be assumed, in favor of the defendant, that the contracts of sale in the case at bar were ultra vires of the corporation, they were not contracts which were prohibited, or contracts which were void as against public policy or good morals; the defect in them is, that the corporation exceeded its powers in making them. The defendant, under these contracts, has received the goods, and retained and used them. Either the corporation must lose the value of its property, or the defendant must pay for it; in such an alternative, courts have held, on one ground or another, that an action can be maintained when the sole defect is a want of authority on the part of the corporation to make the contract. We think that the corporation can maintain an action of contract against the defendant to recover the value of the goods. The defendant is not permitted to set up this want of authority as a defense; and as the form of the transaction was that of contract, such should be the form of the action.

We are not required to determine whether an action can be maintained to recover the price, as distinguished from the value of the goods, as no exception has been taken to the measure of damages. Chester Glass Co. v. Dewey, ubi supra; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Woodruff v. Erie Railroad, 93 N. Y. 609; Nassau Bank v. Jones, 95 N. Y. 115; Pine Grove Township v. Talcott, 19 Wall. 666, 679; National Bank v. Matthews, 98 U. S. 621; National Bank v. Whitney, 103 U. S. 99. See Whitney v. Leominster Savings Bank, 141 Mass. 85; Bowditch v. New England Ins. Co., 141 Mass. 292; Wright v. Pipe Line Co., 101 Penn. St. 204.

Exceptions overruled.1

 $^{^{\}rm 1}$ Upon the last point in the foregoing opinion :

Gray, J., in Central Transportation Co. v. Pullman's Car Co., 139 U.S. 24, 60 (1890):

[&]quot;A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on faith of the unlawful contract, to be recovered back or compensation to be made for it.

§ 4. Lunatics and drunken persons.

GRIBBEN v. MAXWELL.

34 KANSAS, 8.-1885.

Error from Cowley District Court.

Action brought December 7, 1883, by Noah Gribben, as guardian of Olive E. Gribben, a lunatic, against Samuel E. Maxwell, to set aside a conveyance executed by Olive E. Gribben on June 11, 1883.

Horron, C. J. As a general rule, the contract of a lunatic is void *per se*. The concurring assent of two minds is wanting. "They who have no mind caunot 'concur in mind' with one

"In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract."

Walton, J., in Brunswick Gas Light Co. v. United Gas Fuel & Light Co., 85 Me. 532, 541 (1893):

"But it is claimed that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, ultra vires is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works, but do not think the amount can be measured by the ultra vires agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that while the ultra vires agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it cannot be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the ultra vires lease is void, and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Mr. Justice Gray in a recent case in the United States Supreme Court. He said that a contract made by a corporation which is unlawful and void, because heyond the scope of its corporate powers, does not by being carried into execution become lawful and valid, and that the proper remedy of the aggrieved party is to disaffirm the contract and sue to recover as on a quantum meruit the value of what the defendant has actually received the benefit of. Pittsburgh &c. v. Keokuk &c., 131 U.S. 371. We think this is the correct rule. 2 Beach on Corp. § 423, and cases there cited."

On the other hand, the doctrine of equitable estoppel to prevent defendant from relying upon the invalidity of the contract is applied in *Denver Fire* Ins. Co. v. McClelland, 9 Col. 11, 22 (1885).

another; and as this is the essence of a contract, they cannot enter into a contract." 1 Parsons on Contracts (6th ed.), 383; Powell v. Powell, 18 Kas. 371. Notwithstanding this recognized doctrine, the decided cases are far from being uniform on the subject of the liability or extent of liability of lunatics for their contracts. An examination of the cases upon the subject shows that there is an irreconcilable conflict in the authorities. think, however, the weight of authority favors the rule that where the purchase of real estate from an insane person is made. and a deed of conveyance is obtained in perfect good faith, before an inquisition and finding of lunacy, for a sufficient consideration, without knowledge of the lunacy, and no advantage is taken by the purchaser, the consideration received by the lunatic must be returned, or offered to be returned, before the conveyance can be set aside at the suit of the alleged lunatic, or one who represents him.

Wright, C. J., in *Corbit* v. *Smith* (7 Iowa, 60), thus states the law:

"In the next place, a distinction is to be borne in mind between contracts executed and contracts executory. The latter the courts will not in general lend their aid to execute where the party sought to be affected was at the time incapable, unless it may be for necessaries. If, on the other hand, the incapacity was unknown, no advantage was taken, the contract has been executed, and the parties cannot be put in statu quo, it will not be set aside."

In Behrens v. McKenzie (23 Iowa, 333) Dillon, J., said:

"But with respect to executed contracts, the tendency of modern decision is to hold persons of unsound mind liable in cases where the transaction is in the ordinary course of business, is fair and reasonable, and the mental condition was not known to the other party, and the parties cannot be put in statu quo."

In Allen v. Berryhill (27 Iowa, 534) it was decided that:

"Where a contract made by an insane person has been adopted, and is sought to be enforced by the representatives of such person, it is no defense to the sane party to show that the other party was non compos mentis at the time the contract was made."

Cole, J., dissenting, expressed his views as follows:

"In every case of contract with a lunatic, which has been executed in

whole or in part, the fact that the parties can or cannot be placed in statu quo, will have an important bearing in determining whether such contract shall stand. . . . When the parties cannot be placed in statu quo, and the contract is fair, was made in good faith and without knowledge of the lunacy, it will not be set aside, even at the suit of the lunatic. And this, not because the contract was valid or binding, but because an innocent party, one entirely without fault or negligence, might, and in the eyes of the law would, be prejudiced by setting it aside. Both parties are faultless, and therefore stand equal before the law, and in the forum of conscience. The law will not lend its active interposition to effectuate a wrong or prejudice to either; it will suffer the misfortune to remain where nature has cast it."

In Bank v. Moore (78 Pa. St. 407) a lunatic was held liable upon a note discounted by him at the bank; and Mr. Justice Paxson, in delivering the opinion of the court, said, among other things:

"Insanity is one of the most mysterious diseases to which humanity is subject. It assumes such varied forms and produces such opposite effects as frequently to baffle the ripest professional skill and the keenest observation. In some instances it affects the mind only in its relation to or connection with the particular subject, leaving it sound and rational upon all other subjects. Many insane persons drive as thrifty a bargain as the shrewdest business man without betraying in manner or conversation the faintest trace of mental derangement. It would be an unreasonable and unjust rule that such persons should be allowed to obtain the property of innocent parties and retain both the property and its price. Here the bank in good faith loaned the defendant the money on his note. The contract was executed, so far as the consideration is concerned, and it would be alike derogatory to sound law and good morals that he should be allowed to retain it to swell the corpus of his estate."

Mr. Pomeroy, in his treatise on "Equity Jurisprudence," says:

"In general a lunatic, idiot, or person completely non compos mentis, is incapable of giving a true consent in equity, as at law; his conveyance or contract is invalid, and will generally be set aside. While this rule is generally true, the mere fact that a party to an agreement was a lunatic will not operate as a defense to its enforcement or as ground for its cancellation. A contract, executed or executory, made with a lunatic in good faith without any advantage taken of his position, and for his own benefit, is valid both in equity and at law. And where a conveyance or contract is made in ignorance of the insanity, with no advantage taken, and with perfect good faith, a court of equity will not set it aside if the parties cannot be restored to their original position, and injustice would

be done." 2 Pomeroy's Eq. Juris. § 946, p. 465. See also Scanlan v. Cobb, 85 Ill. 296; Young v. Stevens, 48 N. H. 133; Eaton v. Eaton, 37 N. J. L. 108; Freed v. Brown, 55 Ind. 310; Ashcraft v. De Armond, 44 Iowa, 229.

Applying the law thus declared to the case at bar, the District Court committed no error in overruling the demurrer. It appears from the pleadings that the conveyance was executed and delivered before an inquisition and finding of lunacy; that no offer was made to return to the purchaser his money paid for the conveyance of the land; and the answer sets forth good faith on the part of the purchaser; that he paid a fair and reasonable price for the land; that he had no knowledge or information of the lunacy of Olive E. Gribben, the ward of the plaintiff; that there was nothing in her looks or conduct at the time to indicate that she was of unsound mind, or incapable of transacting business; but, on the contrary, that she was apparently in possession of her full mental faculties, and was then, and had been for a long time prior, engaged in the transaction of business for herself.

Our attention is called to the case of Powell v. Powell, supra, as decisive that the conveyance in question is void; but a consideration of the views above expressed and the authorities cited show that all the reasons to avoid a marriage with a lunatic do not apply in the case of a deed obtained in good faith from a lunatic, executed before an inquisition and finding of lunacy. We have examined fully the authorities on the other side of the question, and especially In the matter of DeSilver, 5 Rawle (1835), 110; Gibson v. Soper, 6 Gray, 279; Van Deusen v. Sweet, 51 N. Y. 378; Dexter v. Hall, 82 U. S. 9.

Notwithstanding the recognized ability of the judges rendering these decisions, we are better satisfied with the doctrine herein announced.

The order and judgment of the District Court will be affirmed. All the Justices concurring.¹

¹ See also Young v. Stevens, 48 N. H. 133.

BARRETT v. BUXTON.

2 AIKENS (Vt.), 167. — 1826.

PRENTISS, J. This is an action upon a promissory note, executed by the defendant to the plaintiff for the sum of \$1000, being the difference agreed to be paid the plaintiff on a contract for the exchange of lands. The agreement of exchange was in writing, and the plaintiff afterwards tendered to the defendant a deed, in performance of his part of the agreement, which the defendant refused. The defendant offered evidence to prove, that at the time of executing the note and agreement he was intoxicated, and thereby incapable of judging of the nature and consequences of the bargain. The court refused to admit the evidence, without proof that the intoxication was procured by the plaintiff. The question is, whether the evidence was admissible as a defense to the action, or, in other words, whether the defendant could be allowed to set up his intoxication to avoid the contract.

This question has been already substantially decided by the court on the present circuit; but the importance of the question, and the magnitude of the demand in this case, have led us to give it further consideration. According to Beverley's case (4 Co. 123) a party cannot set up intoxication in avoidance of his contract under any circumstance. Although Lord Coke admits, that a drunkard, for the time of his drunkenness, is non compos mentis, yet he says, "his drunkenness shall not extenuate his act or offense, but doth aggravate his offense, and doth not derogate from his act, as well touching his life, lands, and goods, as anything that concerns him." He makes no distinction between criminal and civil cases, nor intimates any qualification of his doctrine, on the ground of the drunkenness being procured by the contrivance of another who would profit by it. His doctrine is general, and without any qualification whatever; and connected with it, he holds, that a party shall not be allowed to stultify himself, or disable himself, on the ground of idiocy or lunacy. The latter proposition is supported, it is true, by two or three cases in the Year Books, during the reigns of Edward III. and

Henry VI.; by Littleton, s. 405, who lived in the time of Henry VI.; and by Stroud v. Marshall, Cro. Eliz. 398, and Cross v. Andrews, Cro. Eliz. 622. Sir William Blackstone, however, who traces the progress of this notion, as he calls it, considers it contrary to reason, and shows that such was not the ancient common law. The Register, it appears, contains a writ for the alienor himself to recover lands aliened by him during his insanity; and Britton states, that insanity is a sufficient plea for a man to avoid his own bond. Fitzherbert also contends, "that it stands with reason that a man should show how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time." Blackstone considers the rule as having been handed down from the loose cases in the times of Edward III. and Henry VI., founded upon the absurd reasoning, that a man cannot know in his sanity what he did when he was non compos mentis; and he says, later opinions, feeling the inconvenience of the rule, have, in many points, endeavored to restrain it. 2 Black. Com. 291. In Thompson v. Leach (3 Mod. 301) it was held, that the deed of a man non compos mentis was not merely voidable, but was void ab initio, for want of capacity to bind himself or his property. In Yates v. Boen (2 Stra. 1104) the defendant pleaded non est factum to debt on articles, and upon the trial, offered to give lunacy in evidence. The chief justice at first thought it ought not to be admitted, upon the rule in Beverley's case, that a man shall not stultify himself; but on the authority of Smith v. Carr, in 1728, where Chief Baron Pengelly in a like case admitted it, and on considering the case of Thompson v. Leach, the chief justice suffered it to be given in evidence, and the plaintiff became nonsuit. The most approved elementary writers and compilers of the law refer to this case, and lay it down as settled law, that lunacy may be given in evidence on the plea of non est factum, by the party himself; and it is said to have been so ruled by Lord Mansfield, in Chamberlain of London v. Evans, mentioned in note to 1 Chit. Pl. 470. In this country, it has been decided in several instances, that a party may take advantage of his own disability, and avoid his contract, by showing that he was insane and incapable of contracting. Rice v. Peet, 15 Johns. Rep. 503; Webster v. Woodford, 3 Day's Rep. 90. These decisions are founded in the

law of nature and of justice, and go upon the plain and true ground, that the contract of a party non compos mentis is absolutely void, and not binding upon him. The rule in Beverley's case, as to lunacy, therefore, is not only opposed to the ancient common law, and numerous authorities of great weight, but to the principles of natural right and justice, and cannot be recognized as law; and it is apprehended that the case is as little to be regarded as authority in respect to intoxication, which rests essentially upon the same principle.

It is laid down in Buller's N. P. 172, and appears to have been decided by Lord Holt, in Cole v. Robins, there cited, that the defendant may give in evidence under the plea of non est factum to a bond, that he was made to sign it when he was so drunk that he did not know what he did. And in Pitt v. Smith (3 Campb. Cas. 33), where an objection was made to an attesting witness being asked whether the defendant was not in a complete state of intoxication when he executed the agreement, Lord Ellenborough says: "You have alleged that there was an agreement between the parties; but there was no agreement, if the defendant was intoxicated in the manner supposed. He had not an agreeing mind. Intoxication is good evidence upon a plea of non est factum to a deed, of non concessit to a grant, and of non assumpsit to a promise." Chitty, Selwyn, and Phillipps lay down the same doctrine; and Judge Swift in his digest says, that an agreement, signed by a man in a complete state of intoxication, is void. 1 Chit. Pl. 470; Selw. N. P. 563; 1 Phil. Ev. 128; 1 Swift's Dig. 173. In these various authorities it is laid down generally, and without any qualification, that drunkenness is a defense, and no intimation is made of any distinction, founded on the intoxication being procured by the party claiming the benefit of the contract. It is true, that in Johnson v. Medlicott (3 P. Wms. 130) that circumstance was considered essential to entitle the party to relief in equity against his contract. Sir Joseph Jekyll held, that the having been in drink was not any reason to relieve a man against his deed or agreement, unless the party was drawn into drink by the management or contrivance of him who gained the deed. But from what is said in 1 Fonb. Eq. 68, it would not seem that the author considered this circumstance as indispensable.

says, equity will relieve, especially if the drunkenness were caused by the fraud or contrivance of the other party, and he is so excessively drunk, that he is utterly deprived of the use of his reason or understanding; for it can by no means be a serious and deliberate consent; and without this, no contract can be binding by the law of nature. In Spiers v. Higgins, decided at the Rolls in 1814, and cited in 1 Mad. Ch. 304, a bill filed for a specific performance of an agreement, which was entered into with the defendant when drunk, was dismissed with costs, although the plaintiff did not contribute to make the defendant drunk.

On principle, it would seem impossible to maintain, that a contract entered into by a party when in a state of complete intoxication, and deprived of the use of his reason, is binding upon him, whether he was drawn into that situation by the contrivance of the other party or not. It is an elementary principle of law, that it is of the essence of every contract, that the party to be bound should consent to whatever is stipulated, otherwise no obligation is imposed upon him. If he has not the command of his reason, he has not the power to give his assent, and is incapable of entering into a contract to bind himself. Accordingly, Pothier holds (Vol. 1, c. I, a. 4, s. 1) that ebriety, when it is such as to take away the use of reason, renders the person who is in that condition, while it continues, unable to contract, since it renders him incapable of assent. And it seems Heineccius and Puffendorf both consider contracts entered into under such circumstances as invalid. By the Scotch law, also, an obligation granted by a person while he is in a state of absolute and total drunkenness, is ineffectual, because the grantor is incapable of consent; but a lesser degree of drunkenness, which only darkens reason, is not sufficient. Ersk. Inst. 447. The author of the late excellent treatise on the principles and practice of the court of chancery, after reviewing the various cases in equity on the subject, and citing the Scotch law with approbation, observes: "The distinction thus taken seems reasonable; for it never can be said that a person absolutely drunk has that freedom of mind generally esteemed necessary to a deliberate consent to a contract; the reasoning faculty is for a time deposed. At law it has been held, that upon non est factum the defendant may give in evi-

dence, that they made him sign the bond when he was so drunk that he did not know what he did. So a will made by a drunken man is invalid. And will a court of equity be less indulgent to human frailty? It seems to be a fraud to make a contract with a man who is so drunk as to be incapable of deliberation." 1 Mad. Ch. 302. Mr. Maddock seems to consider it as settled, that at law, complete intoxication is a defense, and that it ought to be a sufficient ground for relief in equity; and, indeed, it would seem difficult to come to a different conclusion. As it respects crimes and torts, sound policy forbids that intoxication should be an excuse; for if it were, under actual or feigned intoxication, the most atrocious crimes and injuries might be committed with impunity. But in questions of mere civil concern, arising ex contractu, and affecting the rights of property merely, policy does not require that any one should derive an unjust profit from a bargain made with a person in a state of intoxication, although brought upon himself by his own fault, or that he should be a prey to the arts and circumvention of others, and be ruined, or even embarrassed by a bargain, when thus deprived of his reason. It is a violation of moral duty to take advantage of a man in that defenseless situation, and draw him into a contract; and if the intoxication is such as to deprive him of the use of his reason, it cannot be very material whether it was procured by the other party or was purely voluntary. The former circumstance would only stamp the transaction with deeper turpitude, and make it a more aggravated fraud. The evidence which was offered and rejected at the trial in the case before us, went not only to show that the defendant was so intoxicated at the time of giving the note as to be incapable of the exercise of his understanding, but that the contract was grossly unequal and unreasonable; and, both on principle and authority, we think the evidence was admissible, and that a new trial must be granted.

New trial granted.

§ 5. Married women.

WELLS v. CAYWOOD.

3 COLORADO, 487.-1877.

THATCHER, C. J. This was an action of ejectment brought by the appellee against the appellant in the court below. On the 11th day of August, 1873, Albert W. Benson, being at the time the owner in fee of the premises in dispute, made a promissory note for the sum of \$250, payable to Catherine D. Caywood, the wife of William W. Caywood, two years after the date thereof. On the same date, to secure the payment of this note. Mr. Benson conveyed to William W. Caywood, as trustee, the disputed premises, with power to sell and dispose of the same at public auction in the manner prescribed in said deed of trust, in case the grantor therein should make default in the payment of the promissory note, or any part thereof, or the interest thereon, and to make, execute, and deliver to the purchaser, at such sale, a good and sufficient deed of conveyance for the premises sold. After the maturity of the note, Mr. Benson having made default in its payment, the trustee advertised and sold and conveyed the premises to Mrs. Caywood, the then holder of the note. deed of trust and the note were offered and read in evidence without objection. To the admission of the trustee's deed from Mr. to Mrs. Caywood, counsel for the defendant in the lower court objected, on the sole ground that it was a deed executed by a husband to his wife. This objection was overruled, the deed admitted in evidence, and an exception taken. The admission of the deed in evidence is assigned for error.

This brings us to the consideration of the question of the relation of husband and wife under the laws of this State, with respect to the independent acquisition, enjoyment, and disposition of property. The general tendency of legislation in this country has been to make husband and wife equal in all respects in the eye of the law, to secure to each, untrammelled by the other, the full and free enjoyment of his or her proprietary rights, and to confer upon each the absolute dominion over the property owned by them respectively. The legislation of our own State upon this subject, although yet somewhat crude and imperfect, has doubt-

less been animated by a growing sense of the unjustly subordinate position assigned to married women by the common law, whose asperities are gradually softening and yielding to the demands of this enlightened and progressive age. The benignant principles of the civil law are being slowly but surely grafted into our system of jurisprudence. "In the civil law," says Sir William Blackstone (1 Blackstone's Com. [Cooley] 444), "husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries, and, therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband."

The courts, — which have ever been conservative, and which have always been inclined to check, with an unsparing hand, any attempt at departure from the principles of the body of our law, which were borrowed from England, — in the States which were the first to pass enactments for the enlargement of the rights of married women, regarding such enactments as a violent innovation upon the common law, construed them in a spirit so narrow and illiberal as to almost entirely defeat the intention of the law-makers; but generally with a promptness that left little room for doubt, a succeeding legislature would reassert, in a more unequivocal form, the same principles which the courts had before almost expounded out of existence. To understand the marked changes which our own legislation has wrought in this respect, it is necessary that we should consider some of the disabling incidents and burdens attendant upon coverture at common law. At common law the husband and wife are one person, and as to every contract there must be two parties, it followed that they could enter into no contract with each other. "The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything." "Upon the principle of an union of person in husband and wife depend almost all the legal rights, duties, and disabilities that either of them acquire by marriage." 1 Cooley's Blackstone, 442.

All the personal estate, as money, goods, cattle, household furniture, etc., that were the property and in possession of the

wife at the time of the marriage, are actually vested in the husband, so that of these he might make any disposition in his lifetime, without her consent, or might by will devise them, and they would, without any such disposition, go to the executors or administrators of the husband and not to the wife, though she survive him. Debts due to the wife are so far vested in the husband that he may, by suit, reduce them to possession. 2 Bacon's Abridgment, 21. The rents and profits of her land during coverture belonged to the husband.

The law wrested from the wife both her personal estate and the profits of her realty, however much it might be against her will, and made them liable for his debts.

An improvident husband had it in his power to impoverish the wife by dissipating her personal estate, and the profits of her realty over which she, under the law, by reason of the coverture, had no control.

The wife in Colorado is the wife under our statutes, and not the wife at common law, and by our statutes must her rights be determined, the common law affecting her rights, as we shall presently see, having been swept away.

By our laws it was declared that the property, real and personal, which any woman may own at the time of her marriage, and the rents, issues, profits, and proceeds thereof, and any real, personal, or mixed property that shall come to her by descent, devise, or bequest, or be the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts. R. S. 1868, p. 454.

The legislature, however, being reluctant to allow a married woman the absolute dominion over her own real property, further provided that she could only convey her estate in lands by uniting with her husband in any conveyance thereof, and acknowledging the same separate and apart from her husband. R. S. 1868, p. 111, § 17.

It was not to be expected that our laws would long be permitted to remain in this anomalous and incongruous condition, declaring in one section that the wife's real property should remain her separate estate, not subject to disposal by her husband, and in another that she could not convey it without the consent of her husband, which is necessarily implied by his uniting in a deed with her.

By "an act concerning married women," approved February 12, 1874, it is provided in section 1, that any woman, while married, may bargain, sell, and convey real and personal property, and enter into any contract in reference to the same, as if she were Section 2 provides that she may sue and be sued, in all matters, the same as if she were sole. Section 3 provides that she may contract debts in her own name, and upon her own credit. and may execute promissory notes, bonds, and bills of exchange, and other instruments in writing, and may enter into any contract the same as if she were sole. Section 4 repeals section 17 of chapter 17 of the Revised Statutes, which required the husband to unite with the wife in conveying her separate estate. This is, essentially, an enabling statute, and as such must be liberally construed to effectuate the purpose of its enactment. in terms, enlarged rights and powers upon married women. contemplation of this statute, whatever may be the actual fact, a feme covert is no longer sub potestate viri in respect to the acquisition, enjoyment, and disposition of real and personal property. This statute asserts her individuality, and emancipates her, in the respects within its purview, from the condition of thraldom in which she was placed by the common law. The legal theoretical unity of husband and wife is severed so far as is necessary to carry out the declared will of the law-making power. With her own property she, as any other individual who is sui juris, can do what she will, without reference to any restraints or disabilities of coverture. Whatever incidents, privileges, and profits attach to the dominion of property, when exercised by others, attach to it in her hands. Before this statute her right to convey was not untrammelled, but now it is absolute without any qualification or limitation as to who shall be the grantee. Husband and wife are made strangers to each other's estates. There are no words in the act that prohibit her from making a conveyance directly to her husband, and it is not within the province of the court to supply them.

When a right is conferred on an individual, the court cannot,

without transcending its legitimate functions, hamper its exercise by imposing limitations and restrictions not found in the act conferring it. Were we to construe this enabling statute so as to deprive the wife of the right to elect to whom she will convey her property, we would, it is believed, thwart the legislative will whose wisdom we, as a court, are not permitted to question. The disability of husband and wife to contract with and convey to each other was, at common law, correlated and founded mainly upon the same principle, viz., the unity of baron and femme. The removal in respect to the wife, of a disability that is mutual and springing from the same source, removes it also as to the husband.

The reason, which is the spirit and soul of the law, cannot apply to the husband, as it no longer applies to the wife. If she may convey to the husband, the husband may convey to the wife. Allen v. Hooper, 50 Me. 371; Stone v. Gazzam, 46 Ala. 269; Burdeno v. Amperse, 14 Mich. 91; Patten v. Patten, 75 Ill. 446.

Perhaps the right of the husband when acting in a representative capacity in autre droit to make a deed to his wife might be supported at common law. Co. Litt. 112 a, 187 b; Com. Dig., Baron and Femme, D. 1. This doctrine, however, is repudiated in New York (Leitch v. Wells, 48 Barb. 654) but sanctioned in Pennsylvania. Dundas' Appeal, 64 Pa. St. 332.

We, however, rest our decision, not upon this mooted doctrine, but broadly upon the statute, under which a husband, when acting not in a representative capacity, but in his own right, has, as we have seen, the right to convey directly to the wife.

The court did not err in excluding the deed from Benson and wife to Wells. As we discover no error in the record, the judgment of the court below must be affirmed.

Affirmed.1

¹ For a case showing the conservative attitude in some jurisdiction towards such married women's enabling acts as are apparently most sweeping in terms, see *Seattle Board of Trade* v. *Hayden*, 4 Wash. (State) 263 (1892).

CHAPTER IV.

REALITY OF CONSENT.

- § 1. Mistake.
- (i.) Mistake as to the nature, or as to the existence of the contract.

WALKER v. EBERT.

29 WISCONSIN, 194. - 1871.

Action on a promissory note, by a holder, who claims to have purchased it for full value, before maturity. Verdict for plaintiff. Defendant appeals.

DIXON, C. J. The defendant, having properly alleged the same facts in his answer, offered evidence and proposed to prove by himself as a witness on the stand, that at the time he signed the supposed note in suit, he was unable to read or write the English language; that when he signed the same, it was represented to him as, and he believed it was, a certain contract of an entirely different character, which contract he also offered to produce in evidence; that the contract offered to be produced was a contract appointing him, defendant, agent to sell a certain patent right, and no other or different contract, and not the note in question; and that the supposed note was never delivered by the defendant to any one. It was at the same time stated that the defendant did not claim to prove that the plaintiff did not purchase the supposed note before maturity and for value. this evidence the plaintiff objected, and the objection was sustained by the court, and the evidence excluded, to which the defendant excepted; and this presents the only question.

We think it was error to reject the testimony. The two cases cited by counsel for the defendant (Foster v. McKinnon, L. R. 4 C. P. 704, and Whitney v. Snyder, 2 Lansing, 477) are very clear and explicit upon the point, and demonstrate, as it seems

to us, beyond any rational doubt, the invalidity of such paper, even in the hands of a holder for value, before maturity, without notice. The party whose signature to such a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included.

The reasoning of the above cases is entirely satisfactory and conclusive upon this point. The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is, to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a bona fide holder for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or bona fide holder of it, within the meaning of the law merchant. That which, in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is, and has the qualities of negotiability, because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is petitio principii — begging the question altogether. It is, to use a homely phrase, putting the cart before the horse, and reversing the true order of reasoning, or rather preventing all correct reasoning and investigation, by assuming the truth of the conclusion, and so precluding any inquiry into the antecedent fact or premise, which is the first point to be inquired of and ascertained. For the purposes of this first inquiry, which must be always open when the objection is raised, it is immaterial what may be the nature of the supposed instrument, whether negotiable or not, or whether transferred or

negotiated, or to whom or in what manner, or for what consideration or value paid by the holder. It must always be competent for the party proposed to be charged upon any written instrument, to show that it is not his instrument or obligation. The principle is the same as where instruments are made by persons having no capacity to make binding contracts; as, by infants, married women, or insane persons; or where they are void for other cause, as, for usury; or where they are executed as by an agent, but without authority to bind the supposed principal. In these and all like cases, no additional validity is given to the instrument by putting them in the form of negotiable paper. See Veeder v. Town of Lima, 19 Wis. 297 to 299, and authorities there cited. See also Thomas v. Watkins, 16 Wis. 549.

And identical in principle, also, are those cases under the registry laws where the bona fide purchaser for value of land has been held not to be protected when the recorded deed under which he purchased and claims turns out to have been procured by fraud as to the signature, or purloined or stolen, or was a forgery and the like. See Everts v. Agnes, 4 Wis. 343, and the remarks of this court, pp. 351-353 inclusive.

In the case first above cited, the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guaranty. In an action against him as indorser, at the suit of a bona fide holder for value, the Lord Chief Justice, Boville, directed the jury that, "If the defendant's signature to the document was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict;" and this direction was held proper. In delivering the judgment of the court upon a rule nisi for a new trial, Byles, J., said:

"The case presented by the defendant is that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that when he signed one thing, he was told and believed he was signing another and entirely different thing; and that his mind never went with his act.

It seems plain on principle and on authority that if a blind man, or a man who cannot read, or for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs, then at least, if there be no negligence, the signature so obtained is of no force; and it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign the contract to which his name is appended."

And again, after remarking the distinction between the case under consideration and those where a party has written his name upon a blank piece of paper, intending that it should afterwards be filled up, and it is improperly so filled, or for a larger sum, or where he has written his name upon the back or across the face of a blank bill-stamp, as indorser or acceptor, and that has been fraudulently or improperly filled, or in short, where, under any circumstances, the party has voluntarily affixed his signature to commercial paper, knowing what he was doing and intending the same to be put in circulation as a negotiable security. and after also showing that in all such cases the party so signing will be liable for the full amount of the note or bill, when it has once passed into the hands of an innocent indorsee or holder, for value before maturity, and that such is the limit of the protection afforded to such an indorsee or holder, the learned judge proceeded:

"But in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or an order for admission to Temple Church, or on the fly-leaf of a book, and there had already been without his knowledge a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that

genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature for two reasons; first, that he never in fact signed the writing declared on, and secondly, that he never intended to sign any such contract.

"In the present case the first reason does not apply, but the second does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived not merely as to the legal effect, but as to the actual contents of the instrument."

The other case first above cited, Whitney v. Snyder, was in all respects like the present, a suit upon a promissory note by the purchaser before maturity, for value, against the maker; and the facts offered to be proved in defense were the same as here; and it was held that the evidence should have been admitted.

In Nance v. Lary (5 Ala. 370) it was held that where one writes his name on a blank piece of paper, of which another takes possession without authority therefor, and writes a promissory note above the signature, which he negotiates to a third person, who is ignorant of the circumstances, the former is not liable as the maker of the note to the holder. In that case the note was written over the signature by one Langford, and by him negotiated to the plaintiff in the action, who sued the defendant as maker. Collier, C. J., said:

"The making of the note by Langford was not a mere fraud upon the defendant; it was something more. It was quite as much a forgery as if he had found the blank or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who ever indulges in the idle habit of writing his name for mere pastime, or leaves sufficient space between a title and his subscription, might be made a bankrupt by having promises to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction."

And in Putnam v. Sullivan (4 Mass. 54) Chief Justice Parsons said:

"The counsel for the defendants agree that generally an indorsement obtained by fraud will hold the indorsers according to the terms of it, but they make a distinction between the cases where the indorser,

through fraudulent pretenses, has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which this distinction ought to prevail. As, if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect or misplaced confidence in others." See also 1 Parsons on Notes and Bills, 110 to 114, and cases cited in notes.

The judgment below must be reversed, and a venire de novo awarded. By the court. It is so ordered.

(ii.) Mistake as to the identity of the person with whom the contract is made.

BOSTON ICE CO. v. POTTER.

123 MASSACHUSETTS, 28. - 1877.

Contract on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial. Judgment for defendant. Plaintiff alleged exceptions.

Endicort, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens'

¹ See also Phillip v. Gallant, 62 N. Y. 256; Gibbs v. Linabury, 22 Mich. 479; De Camp v. Hamma, 29 Ohio St. 467. As to effect of negligence in case of negotiable instruments, see Chapman v. Rose, 56 N. Y. 137. Cf. Bedell v. Herring, 77 Cal. 572.

Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. Hills v. Snell, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. Orcutt v. Nelson, 1 Gray, 536, 542; Winchester v. Howard, 97 Mass. 303; Hardman v. Booth, 1 H. & C. 803; Humble v. Hunter, 12. Q. B. 310; Robson v. Drummond, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. Mudge v. Oliver, 1 Allen, 74; Orcutt v. Nelson, ubi supra; Mitchell v. Lapage, Holt N. P. 253.

There are two English cases very similar to the case at bar. In *Schmaling* v. *Thomlinson* (6 Taunt. 147) a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed

it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of Boulton v. Jones (2 H. & N. 564) was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defense to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence.

Exceptions overruled.

(iii.) Mistake as to the subject matter.

a. Mistake of identity as to the thing contracted for.

KYLE v. KAVANAGH.

103 MASSACHUSETTS, 356. - 1869.

Contract to recover the price of land sold and conveyed to the defendant, pursuant to the following agreement:

"Boston, July 2, 1868. I hereby agree to sell to E. Kavanagh four lots of land in Waltham on Prospect Street, so called, for 50 shares of Mitchell Granite stock, 9000 shares of Revenue Gold stock, also \$150 in lawful money for said land. Said Kyle is to give said Kavanagh a good title, if the title is in said Kyle, so he can give deed; if said Kyle cannot give a good title, then this agreement is null and void."

The defendant contended and introduced evidence tending to show that, either by the fraud or misrepresentation of the plaintiff, or by mistake, the land conveyed by the deed was not the land which he bargained for, and that what he had agreed to purchase was a lot of land on another Prospect Street in Waltham, in no way connected with that mentioned in the deed, and a long way off; and he also contended that he was entitled to a warranty deed. Verdict for defendant.

Morton, J. . . . The other exception taken by the plaintiff cannot be sustained. The instructions given were, in substance, that, if the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This ruling is in accordance

with the elementary principles of the law of contracts, and was correct. Spurr v. Benedict, 99 Mass. 463.

Exceptions sustained.1

b. Mistake as to the existence of the thing contracted for.

GIBSON v. PELKIE.

37 MICHIGAN, 380. - 1877.

Assumpsit.

Graves, J. The right Gibson asserts is based solely on an alleged special agreement entitling him to collect so much as he might of a specific judgment, and to retain one-half of the sum collected. According to his own statement of his case, the judgment was the exclusive subject matter of the agreement relied on. No other demand or form of demand entered into the bargain. The parties had nothing else in their minds. not assume to contract about an unliquidated claim or an unadjudicated cause of action, the enforcement of which in Pelkie's name might involve him in a much larger liability than would be likely to attend the collection of a judgment. It was a judgment which formed the subject matter of the bargain. Such was the claim made by the declaration and such was the case in issue. No other ground for recovery appears. Now, there was no proof of a judgment; but there was evidence concerning one, and it seems to have been in effect conceded that there was something which had been taken to be a judgment, but which was so defective that it could not avail anything.

The case must be viewed as it is. It is not admissible to arbi-

¹ (To the ruling as to defendant's right to a warranty deed.) In Hazard v. New England Marine Ins. Co. (1 Sumner, 218), Mr. Justice Story charged that if in a policy of insurance the insured used the term "coppered ship" in one sense and the underwriter in another, "plainly it would be a contract founded in mutual mistake; and therefore neither party would be hound by it. They would not have contracted ad idem. There would never have been an agreement to the same subject matter in the same sense. This principle is so well known and so familiar, that it may now be deemed to be treasured up among the elements of jurisprudence." See also Barfield v. Price, 40 Cal. 535.

trarily admit one part and reject another. If what there is to show that the supposed judgment was void is rejected, then all there is to make out the existence of any such judgment will be stricken out, and if that be done, there will be no proof whatever of the essence of the cause of action set up. There will be no showing that there was any subject matter for the alleged agreement, and no proof to maintain the actual averments of the The cause is presented here by both sides upon the theory that there was something which was intended as a judgment, but which was void and hence uncollectible, and the plaintiff in error cannot ask a more favorable view of the record. then, there was a proceeding which was meant to be a judgment. but which was void, there was nothing to which the actual bargaining could attach. There was no subject matter. The parties supposed there was a judgment, and negotiated and agreed on that basis, but there was none. Where they assumed there was substance, there was no substance. They made no contract because the thing they supposed to exist, and the existence of which was indispensable to the institution of the contract, had no existence. Allen v. Hammond, 11 Pet. 63; Suydam v. Clark, 2 Sandf. Sup'r Court Rep. 133; Gove v. Wooster, Lalor's Supp. to Hill & Den. 30; Smidt v. Tiden, L. R. 9 Q. B. 446; 9 Eng. 379; Couturier v. Hastie, 5 H. L. 673; Hazard v. New England Ins. Co., 1 Sumn. 218; Silvernail v. Cole, 12 Barb. 685; Sherman v. Barnard, 19 Barb. 291; Metcalf on Cont. 30, 31; 1 Poth. Ob. by Evans, 113; Benjamin on Sales, §§ 76, 77, ch. 4; 2 Kent. Com. 468. It is therefore the opinion of a majority of the court that the judgment in Pelkie's favor ought not to be disturbed.

Judgment is affirmed with costs.1

¹ Accord: Allen v. Hammond, 11 Pet. (U. S.) 63; Riegel v. American Life Ins. Co., 140 Pa. 193; S. C., 153 Pa. 134; Duncan v. New York Mut. Ins. Co., 138 N. Y. 88; Bedell v. Wilder, 65 Vt. 406.

SHERWOOD v. WALKER.

66 MICHIGAN, 568. - 1887.

Morse, J. Replevin for a cow. Suit commenced in justice's court. Judgment for plaintiff. Appealed to Circuit Court of Wayne County, and verdict and judgment for plaintiff in that court. The defendants bring error, and set out twenty-five assignments of the same.

The main controversy depends upon the construction of a contract for the sale of the cow. The plaintiff claims that the title passed, and bases his action upon such claim. The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff.

The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne County, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle.

The plaintiff is a banker living at Plymouth, in Wayne County. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon this Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed.

May 5, 1886, plaintiff went out to Greenfield and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow, known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, live weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter:

"WALKERVILLE, May 15, 1886.

"T. C. Sherwood, President, etc.

"Dear Sir,— We confirm sale to you of the cow, Rose 2d of Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We enclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer.

"Yours truly,

"HIRAM WALKER & SONS."

The order upon Graham enclosed in the letter read as follows:

"WALKERVILLE, May 15, 1886.

"George Graham, — You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Plymouth, the cow Rose 2d of Aberlone, lot 56 of our catalogue. Send halter with cow, and have her weighed.

"Yours truly,

"HIRAM WALKER & SONS."

On the twenty-first of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, \$80, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit.

After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1420 pounds.

When the plaintiff, upon the trial in the Circuit Court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony from the case, for the reason that it was irrelevant, and did not tend to show that the title to the cow passed, and that it showed that the contract of sale was merely executory. The court refused the motion, and an exception was taken.

The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost \$850, and if not barren would be worth from \$750 to \$1000; that after the date of the letter, and the order to

Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the twentieth of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following.

On the nineteenth of May the plaintiff wrote Graham as follows:

"Рьумочтн, Мау 19, 1886.

"MR. GEORGE GRAHAM, Greenfield.

"Dear Sir, — I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning.

"Yours, etc.,

"T. C. SHERWOOD."

Plaintiff explained the mention of the two cows in this letter by testifying that, when he wrote this letter, the order and letter of defendants were at his house, and, writing in a hurry, and being uncertain as to the name of the cow, and not wishing his cow watered, he thought it would do no harm to name them both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 17, 1886, in which they named the price of five cattle, including Lucy at \$90, and Rose 2d at \$80. When he received the letter he called defendants up by telephone, and asked them why they put Rose. 2d in the list, as he had already purchased her. They replied that they knew he had, but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

The foregoing is the substance of all the testimony in the case. The circuit judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place, or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order; if they

believed that defendants intended to pass the title by the writing, it did not matter whether the cow was weighed before or after suit brought, and the plaintiff would be entitled to recover.

The defendants submitted a number of requests, which were refused. The substance of them was that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed and her price thereby determined; and that, if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The court also charged the jury that it was immaterial whether the cow was with calf or not. It will therefore be seen that the defendants claim that, as a matter of law, the title to this cow did not pass, and that the circuit judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff.

The following cases in this court support the instruction of the court below as to the intent of the parties governing and controlling the question of a completed sale, and the passing of title: Lingham v. Eggleston, 27 Mich. 324; Wilkinson v. Holiday, 33 Id. 386; Grant v. Merchants' and Manufacturers' Bank, 35 Id. 527; Carpenter v. Graham, 42 Id. 194; Brewer v. Michigan Salt Ass'n, 47 Id. 534; Whitcomb v. Whitney, 24 Id. 486; Byles v. Colier, 54 Id. 1; Scotten v. Sutter, 37 Id. 526, 532; Ducey Lumber Co. v. Lane, 58 Id. 520, 525; Jenkinson v. Monroe Bros. & Co., 61 Id. 454.

It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value,

and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so.

The circuit judge ruled that this fact did not avoid the sale. and it made no difference whether she was barren or not. of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact, -- such as the subject matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. 1 Benj. Sales, §§ 605, 606; Leake, Cont. 339; Story, Sales (4th ed.), §§ 148, 377. See also Cutts v. Guild, 57 N.Y. 229; Harvey v. Harris, 112 Mass. 32; Gardner v. Lane, 9 Allen, 492; S.C., 12 Allen, 44; Huthmacher v. Harris' Adm'rs, 38 Penn. St. 491; Byers v. Chapin, 28 Ohio St. 300; Gibson v. Pelkie, 37 Mich. 380, and cases cited; Allen v. Hammond, 11 Pet. 63, 71.

If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding.

"The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." Kennedy v. Panama &c. Mail Co., L. R. 2 Q. B. 580, 588.

It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that

the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least \$750; if barren, she was worth not over \$80. parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all She was not in fact time, and for her present and ultimate use. the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was a barren cow, and, if this fact had been known, there would have been no contract. take affected the substance of the whole consideration, and it must be considered that there was no contract to sell, or sale of the cow as she actually was. The thing sold and bought had in She was sold as a beef creature would be sold: fact no existence. she is in fact a breeding cow, and a valuable one.

The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendants.

Campbell, C. J., and Champlin, J., concurred. Sherwood, J., dissented.

HECHT v. BATCHELLER.

147 MASSACHUSETTS, 335. -- 1888.

Contract for money had and received. Judgment for plaintiff. Defendants appeal.

MORTON, C. J. The defendants, being the owners of a promissory note which they had taken in the ordinary course of business, sold it through brokers to the plaintiffs. It was afterwards ascertained that, two hours before this sale, the makers of the note had made a "voluntary assignment of all their assets for the benefit of their creditors, to be administered under the insolvent laws of Ohio," of which State they were residents. Neither of the parties to this suit, nor the brokers employed by the defendants, knew of the assignment at the time of the sale, but they all supposed that the makers were doing business as theretofore. The plaintiffs contend that they are entitled to recover upon either of two grounds: first, that there was a mutual mistake of the parties as to the thing sold, and therefore no contract was completed between them; and, secondly, that there was a warranty express or implied, by the defendants, that the makers of the note were then carrying on business, and had not failed or made an assignment.

It is a general rule, that, where parties assume to contract, and there is a mistake as to the existence or identity of the subject matter, there is no contract, because of the want of the mutual assent necessary to create one; so that, in the case of a contract for the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or, if he receives it, may upon discovery of the mistake return it, and recover back the price he has paid. But to produce this result the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold. Gardner v. Lane, 9 Allen, 492; Gardner v. Lane, 12 Allen, 39; Spurr v. Benedict, 99 Mass. 463; Bridgewater Iron Co. v. Enterprise Ins. Co., 134 Mass. 433; Benjamin on Sales, \S 54.

In the case at bar, the subject matter of the contract was the note of J. and S. B. Sachs. The note delivered was the same note which the parties bought and sold. They may both have understood that the makers were solvent, whereas they were insolvent; but such a mistake or misapprehension affects the value of the note and not its identity. Day v. Kinney, 131 Mass. 37. In Day v. Kinney, the makers of the note sold were in fact insolvent, but they had not stopped payment or been adjudged insolvent, and the decision is confined to the facts of the case. But we think the same principles apply in this case. The makers of the note had made an assignment for the benefit of their creditors, but this did not extinguish the note, or destroy its identity. It remained an existing note, capable of being enforced, with every essential attribute going to its nature as a note which it had before. Its quality and value were impaired, but not its identity. The parties bought and sold what they intended, and their mistake was not as to the subject matter of the sale, but as to its quality. We are therefore of opinion that the sale was valid, and that the plaintiffs cannot recover the amount they paid, as upon a failure of consideration.

* * * * *

We think the principles we have stated are decisive of the case before us. The defendants sold the note in good faith. So far as the evidence shows, neither party, at the time of the sale, spoke of, or inquired about, or knew anything about, the failure of the makers. They stood upon an equal footing, and they had equal means of knowing the standing of the makers. It was understood that the defendants were selling the note without recourse to them. They did not expressly warrant the value of the note, and we are of the opinion that from the circumstances no warranty could fairly be inferred of the solvency of the makers, or that they continued to do business.

We are therefore of opinion, . . . upon the facts of the case, the court was not justified in finding for the plaintiffs.

Exceptions sustained.

WOOD v. BOYNTON.

64 WISCONSIN, 265. - 1885.

Taylor, J. This action was brought in the Circuit Court for Milwaukee County to recover the possession of an uncut diamond of the alleged value of \$1000. The case was tried in the Circuit Court and, after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and, after judgment was entered in favor of the defendants, appealed to this court.

The defendants are partners in the jewelry business. On the trial it appeared that on and before the 28th of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about \$700. After learning this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows:

"The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into his store to get a little pin mended, and I had it in a small box,—the pin, a small ear-ring, . . . this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and seemed some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, 'I would buy this; would you sell it?' I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty

to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterwards, and about the 28th of December, I needed money pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz, and he says, 'Well, yes; what did I offer you for it?' and I says, 'One dollar;' and he stepped to the change drawer and gave me the dollar, and I went out."

In another part of her testimony she says:

"Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg, worn pointed at one end; it was nearly straw color, a little darker."

She also testified that before this action was commenced she tendered the defendants \$1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no idea this was a diamond, it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but the evidence has very little, if any, bearing upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. The title to the stone passed by the sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the Boyntons of the purchase money, with interest, and a demand of a return of the stone to her. Unless such tender and demand revested the title in the appellant, she cannot maintain her action.

The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are, (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold, a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and quali-If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. Kennedy v. Panama &c. Mail Co., L. R. 2 Q. B. 580.

There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. Kennedy v. Panama &c. Mail Co., L. R. 2 Q. B. 587; Street v. Blay, 2 Barn. & Adol. 456; Gompertz v. Bartlett, 2 El. & Bl. 849; Gurney v. Womersley, 4 El. & Bl. 133; Ship's Case, 2 De G., J. & S.

544. Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her \$500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mr. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond. See Street v. Bluy, supra.

It is urged, with a good deal of earnestness, on the part of the counsel for the appellant, that, because it has turned out that the stone was immensely more valuable than the parties at the time of the sale supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made.

When this sale was made the value of the thing sold was open to the investigation of both parties; neither knew its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. Whether that fact would have any influence in an action in equity to avoid the sale, we need not consider. See Stettheimer v. Killip, 75 N. Y. 287; Etting v. Bank of U. S., 11 Wheat. 59.

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a sup-

pression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. Following cases show that, in the absence of fraud or warranty, the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. Wheat v. Cross, 31 Md. 99; Lambert v. Heath, 15 Mees. & W. 487; Bryant v. Pember, 45 Vt. 487; Kuelkamp v. Hidding, 31 Wis. 503, 511.

However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

By the court. The judgment of the Circuit Court is affirmed.

ROVEGNO v. DEFFERARI.

40 CALIFORNIA, 459.-1871.

Action for dissolution of alleged partnership and distribution of proceeds. Defense, no partnership. Judgment for plaintiff. Defendant appeals.

Wallace, J. It is not disputed that Cassinelli was at one time a copartner with the defendant, owning an interest of one-third in the copartnership. Each of the parties to the controversy, Rovegno and Defferari, claims to have purchased that interest from Cassinelli, and this is the only question presented here.

It was determined below, and we think correctly, that Rovegno was the purchaser of that interest. The facts are, that on March 17, 1869, Cassinelli agreed to sell it to Rovegno, and then received part of the purchase price; that on the next day (March 18th) Cassinelli and Defferari entered into a treaty concerning the sale of this interest to the latter; that this was in the presence and with the consent of Rovegno. On this occasion a sale of this interest was supposed to have been made by Cassinelli to Defferari; but it turned out afterwards that the parties to that transaction (Cassinelli and Defferari) had entirely misunderstood

each other as to the price to be paid. Cassinelli thought that he was selling for \$850, and Defferari supposed himself to be purchasing at \$750. Upon discovery of this mistake the latter refused to take the interest at \$850. On the 22d March the sale from Cassinelli to Rovegno was made, pursuant to the agreement of March 17th, and a bill of sale was then made to the latter.

Upon the ascertained fact that Cassinelli and Defferari were each mistaken as to the purchase price of this copartnership interest, and each was, therefore, assenting to a supposed contract which had no real existence, it results that there was no valid agreement, notwithstanding the apparent assent of each. It is in principle like the case of Phillips v. Bistolli (2 B. & C. 511), where it appeared that the defendant, who was a foreigner, not understanding the English language well, attended an auction sale in London, and there bid eighty-eight guineas for certain goods, which were, thereupon, knocked down to him, and when sued for the purchase price, he set up in defense that he supposed he was bidding only forty-eight guineas for the goods, and that the mistake grew out of his imperfect knowledge of the English language, in which language the auction was conducted. Justice Abbott left it to the jury to find if the defendant had been mistaken as to the price bid, the court being of the opinion that if such a mistake had really intervened, the parties could not be said to have entered into a contract at all.

Judgment and order denying new trial affirmed.1

c. Mistake by one party as to the intention of the other, known to that other.

SHELTON v. ELLIS.

70 GEORGIA, 297.-1883.

Bill in equity for an injunction to restrain defendant from disposing of certain railroad tickets and for the appointment of a receiver to hold them.

¹ Accord: Rupley v. Daggett, 74 Ill. 351; Rowland v. New York &c. R. Co., 61 Conn. 103.

Plaintiff was employed to compile a rate sheet for the W. & A. Ry., showing cost of tickets between different points. By mistake he printed the fare from Atlanta, Georgia, to Rogers, Arkansas, as \$21.25, when it should have been \$36.70. Defendant discovered the mistake, and immediately purchased of the ticket agent of the W. & A. Ry. a large number of the tickets at the price printed in the rate sheet. Plaintiff, being responsible to the railway for the error, offered to return defendant's money and demanded the tickets, which offer and demand were refused by defendant. Plaintiff alleges in his bill that defendant knew that a mistake had been made in the rate sheet and fraudulently took advantage of it.

Defendant answered denying any fraud, and asserting that the sale was made without any misrepresentations on the part of defendant and from the plaintiff's own rate sheet.

The court granted a temporary injunction and appointed a receiver. Defendant appeals.

HALL, J. There is no question made here as to the propriety of the orders passed by his honor, the presiding judge, if the case made by the bill entitles the complainants to the relief prayed. Upon the question made there was a conflict of evidence; there was no abuse of discretion, if the law authorized the interposition of the judge. The order appointing the receiver and directing the injunction carefully preserved the rights of all the parties to the final hearing of the cause.

The first and only question made which we shall consider and determine, is whether appropriate relief can be granted by a court of equity, in a case where there has been a mistake on one side, and it is alleged that a fraudulent advantage has been knowingly taken of this mistake by the opposite party, to his gain and to the serious detriment and injury of the party making the mistake. The question is thus broadly stated, to meet the views presented by the counsel in the case.

In Wyche et al. v. Greene (26 Ga. 415) this court held that what is a mistake on one side and a fraud on the other is as much the subject of correction as if it were a mistake on both sides, and in delivering the opinion of the court, Benning, J. (at p. 422), said:

"The court's charge that a mistake, to be the subject of correction, must be a mistake in which all the parties to the contract participate, was too absolute. If one of the parties to a contract is mistaken in a matter, and the others know that he is and do not apprise him of it, yet the mistake, though not one on their part, is the subject of correction. The case becomes one in which there is a mistake in one of the parties to the contract and a fraud in the others. Such a case is even more readily the subject of relief, at his instance, than is a case in which there is nothing but a mistake, although that be a mistake extending to all the parties."

There is nothing that we are aware of, either in the Code or any subsequent decision of this court, modifying the law as here declared. On the other hand, we think there is much confirming the view here taken. Compare with this Code §§ 3117, 3119 to 3126, both inclusive, and 3180. The conditions upon which relief will be granted or denied must, under the sections of the Code and the cases cited under them, depend in large measure upon the circumstances of each particular case, and upon all the facts developed, which should be passed upon by the jury at the final hearing, and ought not to be too closely scrutinized or evenly balanced in these preliminary proceedings. All that the judge decides at that stage of the cause is that there is enough developed to carry the case to the jury, whose exclusive province it is to determine the force and effect of facts as applied to the law given them in charge by the court. This is all that the judge has undertaken in this case.

Judgment affirmed.1

¹ See also Laidlaw v. Organ, 2 Wheat. 178, post, p. 282.

§ 2. Misrepresentation.

(i.) Misrepresentation distinguished from fraud.

Note. — For cases under this topic, see the cases on "Effects of Misrepresentation," post, p. 268, and on "Knowledge of Falsity," post, p. 298.

(ii.) Representations distinguished from tern

DAVISON v. VON LINGEN.

113 UNITED STATES, 40. - 1884.

Libel in personam, in admiralty, against the owners of the steamer Whickham, to recover damages for breach of charter-party. Cross-libel in personam against the charterers for damages for breach of charter-party.

The charter-party was executed at Philadelphia on August 1, 1879, and provided that the steamship Whickham "now sailed or about to sail from Benizaf with cargo for Philadelphia, . . . with liberty to take outward cargo to Philadelphia for owner's benefit, shall, with all convenient speed, sail and proceed to Philadelphia or Baltimore, at charterers' option, after discharge of inward cargo at Philadelphia, or as near thereunto as she may safely get, and there load affoat from said charterers, or their agents, a full and complete cargo of grain and (or) other lawful merchandise." The owners had submitted a charter-party in which the vessel was described as "sailed from, or loading at, Benizaf," but this the charterers declined to accept, and the charter-party was executed with the description "now sailed or about to sail from Benizaf." In fact the vessel was then loading at Benizaf, and did not sail until August 7th. On the 9th the charterers learned that she had that day passed Gibraltar, and being satisfied that she would not arrive in time to load in August, procured another vessel, which they loaded at an increased rate of freight, as favorable as possible. The Whickham discharged her cargo at Philadelphia on September 7th and was tendered to the charterers at Baltimore on the 11th. The charterers declined to accept her on the ground that she had neither sailed nor was about to sail from Benizaf on August 1st. Another charter was then obtained at a loss, on as favorable terms as possible, and for this loss the owners filed the cross-libel.

It further appeared that all parties understood that the charterers wanted a vessel which could load in August; that they had asked a guaranty that the Whickham would arrive in time, but this was refused; that the basis of the belief that the Whickham would arrive rested on telegraphic information from Gibraltar, a day's sail from Benizaf.

Decree for cross-libellants in District Court, which was reversed in the Circuit Court and a decree entered for the libellants.

Mr. Justice Blatchford. . . . The decision of the Circuit Court proceeded on the ground that the language of the charter-party must be interpreted, if possible, as the parties in Baltimore understood it when they were contracting. In view of the facts, that all the contracting parties understood that the vessel was wanted to load in August, that, as soon as the charterers learned that she did not leave Gibraltar until the 9th, they took steps to get another vessel, and that they declined to sign a charter-party which described the vessel as "sailed from, or loading at, Benizaf," the court held that the language of the charter-party meant that the vessel had either sailed, or was about ready to sail, with cargo; and that the vessel was not in the condition she was represented, being not more than three-elevenths loaded.

The argument for the appellants is, that the words of the charter-party "about to sail with cargo" imply that the vessel has some cargo on board but is detained from sailing by not having all on board, and that she will sail, when, with dispatch, all her cargo, which is loading with dispatch, shall be on board; and that this vessel fulfilled those conditions. As to the attendant circumstances at Baltimore, it is urged that the charterers asked for a guaranty that the vessel would arrive in time for their purposes, and it was refused, and that the printed clause as to an option in the charterers to cancel was stricken out, and that then the charterers accepted the general words used.

The words of the charter-party are, "now sailed, or about to sail, from Benizaf, with cargo for Philadelphia." The word "loading" is not found in the contract. The sentence in question implies that the vessel is loaded, because the words "with cargo" apply not only to the words "about to sail," but to the word "sailed," and as, if the vessel had "sailed with cargo," she

must have had her cargo on board, so, if it is agreed she is "about to sail with cargo," the meaning is, that she has her cargo on board, and is ready to sail. This construction is in harmony with all that occurred between the parties at the time, and with the conduct of the charterers afterwards. The charterers wanted a guaranty that, even if the vessel had already sailed, or whenever she should sail, she would arrive in time for them to load her with grain in August. This was refused, and the charterers took the risk of her arriving in time, if she had sailed, or if, having her cargo then on board, she should, as the charterparty says, "with all convenient speed, sail and proceed to Philadelphia or Baltimore." Moreover, the charterers refused to sign a charter-party with the words "sailed from, or loading at, Benizaf," and both parties agreed on the words in the charterparty, which were the words of authority used by the agents in Philadelphia of the owners of the vessel. The erasing of the printed words, as to the option of cancelling, was in harmony with the refusal of the owners to guarantee the arrival by a certain day. So, also, when the charterers learned, on the 9th of August, that the vessel did not leave Gibraltar till that day, they proceeded to look for another vessel. It was then apparent that the vessel had not left Benizaf by the 1st of August, or with such reasonable dispatch thereafter, that she could have had her cargo on board, ready to sail on the 1st of August.

That the stipulation in the charter-party, that the vessel is "now sailed, or about to sail, from Benizaf, with cargo, for Philadelphia," is a warranty, or a condition precedent, is, we think, quite clear. It is a substantive part of the contract, and not a mere representation, and is not an independent agreement, serving only as a foundation for an action for compensation in damages. A breach of it by one party justifies a repudiation of the contract by the other party, if it has not been partially executed in his favor. The case falls within the class of which Glaholm v. Hays (2 Man. & Gr. 257), Ollive v. Booker (1 Exch. 416), Oliver v. Fielden (4 Exch. 135), Gorrissen v. Perrin (2 C. B. N. S. 681), Croockewit v. Fletcher (1 H. & N. 893), (Seeger v. Duthie (8 C. B. N. S. 45), Behn v. Burness (3 B. & S. 751), Corkling v. Massey (L. R. 8 C. P. 395), and Lowber v. Bangs (2 Wall.

728) are examples; and not within the class illustrated by Tarrabochia v. Hickie, 1 H. & N. 183; Dimech v. Corlett, 12 Moore P. C. 199; and Clipsham v. Vertue, 5 Q. B. 265. It is apparent, from the averments in the pleadings of the charterers, of facts which are established by the findings, that time and the situation of the vessel were material and essential parts of the contract. Construing the contract by the aid of, and in the light of, the circumstances existing at the time it was made, averred in the pleadings and found as facts, we have no difficulty in holding the stipulation in question to be a warranty. See Abbott on Shipping, 11th ed. by Shee, pp. 227, 228. But the instrument must be construed with reference to the intention of the parties when it was made, irrespective of any events afterwards occurring; and we place our decision on the ground that the stipulation was originally intended to be, and by its term imports, a condition precedent. The position of the vessel at Benizaf, on the 1st of August — the fact that, if she had not then sailed, she was laden with cargo, so that she could sail - these were the only data on which the charterers could make any calculation as to whether she could arrive so as to discharge and reload in August. They rejected her as loading; but if she was in such a situation, with cargo in her, that she could be said to be "about to sail," because she was ready to sail, they took the risk as to the length of her voyage.

The decree of the Circuit Court is affirmed.1

(iii.) Effects of misrepresentation.

a. In contracts generally.

WILCOX v. IOWA WESLEYAN UNIVERSITY.

32 IOWA, 367. - 1871.

Action to foreclose a mortgage executed by defendant college to secure a promissory note. Defense, accord and satisfaction of

¹ See also Norrington v. Wright, 115 U. S. 203, post, p. 584; Wells. Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397; Morrill v. Wallace, 9 N. H. 113; Wolcott v. Mount, 36 N. J. L. 262, post, Pt. V. Ch. III. § 2.

note and mortgage, in consideration of certain lands agreed by defendant to be given and by plaintiff to be taken as payment. Plaintiff sets up that he was induced to enter into such agreement by the false representations of defendant as to the location, character, and value of the land. Such representations are found to be in fact false, but also that the agent of the defendant made them in good faith, believing each piece of land to be as described.

A decree was entered by the trial court cancelling the note and mortgage and releasing defendant from all liability thereon. Plaintiff appeals.

MILLER, J. . . . Is the plaintiff entitled to be relieved from his agreement compounding his claim against defendant, and, if so, to what extent?

The appellee cites Holmes v. Clark (10 Iowa, 423), which holds, that in order to sustain an action on the ground of false and fraudulent representations in the sale of land, it must be shown that the representations were false and fraudulent within the knowledge of the party making them; and he argues that appellant is, in view of the law, without remedy in this case. The rule laid down in that case is well established and universally followed in all actions at law for damages sustained by false and fraudulent representations in a sale (see cases cited by appellant in that case); but equity will grant relief on the ground of fraud, although the party representing a material fact made the assertion without knowing whether it was true or not. The consequences to the person who acted on the faith of the representations are the same whether he who made them knew them to be false or was ignorant whether they were true or not. And if the representations were made to influence the conduct of another party in a matter of business, and they did influence him to his prejudice, equity will interfere and grant him relief. Willard's Eq. Jur. 150; Ainslie v. Medlycott, 9 Ves. 21; Harding v. Randall, 15 Me. 332; Smith v. Richards, 13 Pet. 38; Turnbull v. Gadsden, 2 Strobh. (S. C.) Eq. 14; McFerran v. Taylor, 3 Cranch, 281.

And even if by mistake, and innocently, a party misrepresents a material fact, upon which another party is induced to act, it is as conclusive a ground of relief in equity as a wilful and false assertion. Taylor v. Ashton, 11 Mees. & Wels. 400; Foster v. Charles, 6 Bing. 396.

Now it is entirely clear, from the evidence, that the plaintiff was thus induced to act in this case. The lots were represented to be of particular situations and values, when they were in fact otherwise; and while the agent informed plaintiff that he had never seen the lots himself, and did not make the representations from his own knowledge, yet he did what was, substantially, the same thing, by stating what the donors said in respect to their situations and values, and that he (the agent) knew one of the donors, whom he represented to be a smart business man and a leading member of the church, whose statements could be relied Through the representations and persuasions of the agent, the plaintiff generously donated or agreed to donate forty per centum of his claim to the university, and receive in payment of the balance real property at cash prices. This he was, in equity and conscience, entitled to receive. He selected the two lots before mentioned upon the representations of the agent, relying entirely, as he had a right to do under the circumstances, thereon respecting the situation and value of the same. The lots were not as represented. They were represented by the agent to be worth, in the aggregate, the sum of \$1000, whereas they were worth less than one-fifth that sum. Under these circumstances the plaintiff is clearly entitled to equitable relief from so unconscionable a bargain. Nor do we think, under all the circumstances of the case, that he has lost his right to relief by any delay or laches on his part. And as, by his agreement, he was to receive land at cash prices, to the extent of sixty per centum of his claim, which the university has failed to pay or convey to him, he will be entitled to recover the money instead of these lots, according to his contract entered into June 6, 1861, viz.: \$1000 with six per centum interest from that date, upon reconveying the lots to the university or to whom it shall direct.

* * * *

The judgment of the District Court is reversed, and the cause will be remanded for further proceedings not inconsistent with

this opinion, or the appellant may, if he so elect, have final judgment in this court.

Reversed.1

SCHOOL DIRECTORS v. BOOMHOUR.

83 ILLINOIS, 17. - 1876.

Action for damages for breach of contract. Verdict for plaintiff, from which defendants appeal.

Scott, J. The finding and judgment of the court are plainly and manifestly against the weight of evidence, and so palpable is the error, the judgment, for that cause, must be reversed. plaintiff applied to defendants to teach their district school, they distinctly informed him it was conditionally engaged to Miss Swartz, and if she succeeded in getting a certificate of qualification that week at the teachers' institute, then in session at Lena, she was to have the school; but he assured them she could not get a certificate, for the reason, as he "understood, there would be no examination for teachers that week." Other testimony is much stronger, but this is plaintiff's own statement, and in that he was clearly mistaken. One object in holding the institute, as stated by the county superintendent of schools, was, that an examination of teachers might be had, and, he states, public announcement was made that such examination would take place. Plaintiff was present at that meeting of the institute, but whether he heard the announcement or not, the superintendent does not know. That such examination would be held was a matter of public notoriety, and as it was of special interest to those assembled, it must have been the subject of conversation.

The fact is uncontroverted, Miss Swartz was at that session of the institute, was examined, and received the usual certificate of qualification. On presenting it to defendants, they gave her the

¹ Accord: Doggett v. Emerson, 3 Story (U. S. C. C.), 700; Spurr v. Benedict, 99 Mass. 463; Hammond v. Pennock, 61 N. Y. 145; Taylor v. Leith, 26 Ohio St. 428; Lewis v. McLemore, 10 Yerg. (Tenn.) 206. See also note to Chatham Furnace Co. v. Moffatt, post, p. 301.

school, according to their original agreement with her, and refused to allow plaintiff to teach, and so notified him at once by letter. In this they did right. Plaintiff's employment was induced either by a misrepresentation or a misapprehension of facts, and he could not demand the performance of his alleged contract. Defendants were misled by the erroneous information communicated by plaintiff, and he will not be permitted to make his wrongful conduct a ground of an action in his favor. Whether his representations of facts were wilfully or innocently untrue, is a question about which we need express no opinion. The effect is the same, whether he knew they were untrue or not.

Legally, Miss Swartz was entitled to the benefit of her contract with defendants, and they never would have negotiated with plaintiff concerning the school had it not been for his representation she could not obtain the requisite certificate. On these principal facts there is absolutely no conflict in the testimony. It is all one way. There is not a shadow of justice in the claim put forth by plaintiff, and in no view that can be taken, can he be permitted to recover.

The judgment of the court below will be reversed.

Judgment reversed.

WOODRUFF & CO. v. SAUL.

70 GEORGIA, 271.-1883.

Action on an account. Defense, composition and release. Judgment for defendant. Plaintiffs appeal.

Plaintiffs sued defendant on an account, and in reply to the defense of composition and release, set up that the agreement was procured by the false representations of the defendant.

Crawford, J. . . . The error complained of in the charge given, is that the debtor must know his representations to be false, to make the settlement void. It is thoroughly well settled by the common law that the misrepresentation of a material fact, made by one of the parties to a contract, though made by mistake and innocently, if acted on by the opposite party, constitutes legal

fraud. Story's Eq., 191 et seq.; Kerr on Fraud and Mistake, 53 et seq.; 6 Ga. 458.

Judgment reversed.1

b. In contracts uberrimæ fidei.

WALDEN v. LOUISIANA INSURANCE CO.

12 LOUISIANA, 134.-1838.

MARTIN, J. The plaintiff is appellant from a judgment, which rejected his claim for the value of a house, insured by the defendants, and which was destroyed by fire.

The facts of the case are these: A ropewalk, which was so contiguous to the house, that the destruction of the former by fire, must necessarily have involved the latter in the like calamity; it was rumored, that an attempt had been made to set fire to the ropewalk, which induced the plaintiff to insure the house. The

Where the defense to notes given to aid in the building of a railway was that they were obtained by false representations, the court said: "Even where the representations, however innocently made, are untrue in fact, the party who relies upon them ought not to be bound by a misrepresentation which positively and directly deceives him; and where an expressed representation turns out to be untrue, it is immaterial whether the party making it knew it to be false or not. If he did not know it to be true (and he could not know it to be so if it were false), he is as answerable as if he made it, knowing it to be false. As the defendant by confiding in the false and erroneous representations of Carlson was induced to sign the notes, he ought in equity and good conscience not to pay them. Waters v. Mattingly, 1 Bibb, 244; East v. Matheny, 1 A. K. Marsh, 192." Horton, C. J., in Wickham v. Grant, 28 Kan. 517.

But in *Gregory* v. *Schoenell* (55 Ind. 101), where the action was replevin to recover possession of property delivered under a contract alleged to have been induced by false representations, the court said: "In such a case, to establish fraud and authorize a rescission of the contract for that cause, the representations made must have been such as were calculated to deceive a person of common prudence; they must have been false, and known to be false at the time, by the person who made them, and the person to whom they were made must have believed them to be true and relied upon them; and they must have been the inducement which caused him to part with his property."

defendants resisted his claim, on the ground, that he had not communicated the circumstance, which had excited his alarm and determined him to insure.

It appears to us, the District Court did not err. The underwriter had an undoubted right to be informed of every circumstance, which, creating or increasing the risk against which insurance is sought, may induce him to decline the insurance, or demand a higher premium. It appears, from the plaintiff's own confession, that the attempt which had been made to set on fire a building, which could not have been consumed without materially endangering his house, created in him an alarm, which prompted him to guard against the danger.

It is true, he evidently acted in good faith; for when he called on the defendants for indemnification, he candidly informed them of the circumstance which had alarmed him. His ignorance of his duty cannot protect him against his omission to give information of a material fact, which the defendants had a right to know, in order to establish the proper rate of insurance.

It is therefore ordered, adjudged, and decreed that the judgment of the District Court be affirmed, with costs.¹

1 "In respect to the duty of disclosing all material facts, the case of reinsurance does not differ from that of an original insurance. The obligation in both cases is one uberrimæ fidei. The duty of communication indeed is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive. The exaction of information in some instances may be greater in a case of reinsurance than as between the parties to an original insurance. In the former the party seeking to shift the risk he has taken is bound to communicate his knowledge of the character of the original insured, where such information would be likely to influence the judgment of an underwriter; while in the latter the party, in the language of Bronson, J., in the case of the New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. (N. Y.) 359, 367, is 'not bound nor could it be expected that he should speak evil of himself.'"—Mr. Justice Matthews, in Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 510.

For concealment in marine insurance, see Ely v. Hallett, 2 Caines' Rep. 57.

For innocent misrepresentation, see Goddard v. Monitor Ins. Co., 108 Mass. 56.

PHŒNIX LIFE INS. CO. v. RADDIN.

120 UNITED STATES, 183.—1887.

Action at law to recover upon a life insurance policy issued by defendant upon the life of plaintiff's son.

Judgment for plaintiff. Defendant appeals.

The policy contained a provision that, "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void." Question 28 and the answer were as follows:

"28. Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of the policy."

"\$10,000, Equitable Life Assurance Society."

Defendant offered to prove that the assured, within three weeks before the application for the policy in suit, had made applications to two other companies for insurance on the life of the insured, each of which had been declined. The court excluded the evidence and ruled, "that if the answer to one of the interrogatories of question 28 was true, there would be no breach of warranty; that the failure to answer the other interrogatories of question 28 was no breach of the contract; and that if the company took the defective application, it would be a waiver on their part of the answers to the other interrogatories of that question."

MR. JUSTICE GRAY. . . . The jury having returned a verdict for the plaintiff in the full amount of the policy, the defendant's exceptions to the refusal to rule as requested and to the rulings aforesaid present the principal question in the case.

The rules of law which govern the decision of this question are well settled, and the only difficulty is in applying those rules to the facts before us. Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. *Moulor* v. *American Ins. Co.*, 111 U. S. 335; *Campbell* v. *New England Ins. Co.*, 98 Mass. 381; *Thomson* v. *Weems*, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. Carpenter v. Providence Washington Ins. Co., 16 Pet. 495; Jeffries v. Life Ins. Co., 22 Wall. 47; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Macdonald v. Law Union Ins. Co., L. R. 9 Q. B. 328; Edington v. Ætna Life Ins. Co., 77 N. Y. 564, and 100 N. Y. 536.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. Cazenove v. British Equitable Assurance Co., 29 Law Journal (N. S.), C. P. 160, affirming S. C. 6 C. B. N. S. 437. But where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial. Connecticut Ins. Co. v. Luchs, 108 U. S. 498; Hall v. People's Ins. Co., 6 Gray, 185; Lorillard Ins. Co. v. McCulloch, 21 Ohio St. 176; American Ins. Co. v. Mahone, 56 Mississippi, 180; Carson v. Jersey City Ins. Co., 14 Vroom, 300, and 15 Vroom, 210; Lebanon Ins. Co. v. Kepler, 106 Penn. St. 28.

The distinction between an answer apparently complete, but in

fact incomplete and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. Towne v. Fitchburg Ins. Co., 7 Allen, 51. But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. Nichols v. Fayette Ins. Co., 1 Allen, 63.

In the contract before us, the answers in the application are nowhere called warranties, or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued;" and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must therefore be considered, not as warranties which are part of the contract, but as representations collateral to the contract, and on which it is based.

The 28th printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the number of policy." The only answer written opposite this question is, "\$10,000, Equitable Life Assurance Society."

The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer.

But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object, the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance and in what company, and thus renders the fourth interrogatory irrelevant. the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the 28th question, to determine that it was immaterial, for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional.

The case of London Assurance v. Mansel (11 Ch. D. 363), on which the insurers relied at the argument, did not arise on a question including several interrogatories as to whether another application had been made, and with what result, and the amount of existing insurance, and in what company. But the application or proposal contained two separate questions; the first, whether a proposal had been made at any other office, and, if so, where; the second, whether it was accepted at the ordinary premium, or at an increased premium, or declined; and contained no third question or interrogatory as to the amount of existing insurance, and in what company. The single answer to both questions was, "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." There being no specific interrogatory as to the amount of existing insurance, that answer could apply only to the question whether a proposal had been made, or to the question whether it had been accepted, and at what rates, or declined; and as applied to either of those questions it was in fact, but not upon its face, incomplete and therefore untrue. applied to the first question, it disclosed only some and not all of the proposals which had in fact been made; and as applied to the second question, it disclosed only the proposals which had been accepted, and not those which had been declined, though the question distinctly embraced both. That case is thus clearly distinguished in its facts from the case at bar. So much of the remarks of Sir George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued without further inquiry, can hardly be reconciled with the uniform current of American decisions.

For these reasons, our conclusion upon this branch of the case is that there was no error, of which the company had a right to complain, either in the refusals to rule, or in the rulings made.

The only objection remaining to be considered is that of variance between the declaration and the evidence, which is thus stated in the bill of exceptions: "After the plaintiff had rested, the defendant asked the court to rule that there was a variance between the declaration and the proof, inasmuch as the declaration stated the consideration of the contract to be the payment of the sum of \$152.10 and of an annual premium of \$304.20, while the policy showed the consideration to be the representations made in the application as well as payment of the aforesaid sums of money, and that an amendment to the declaration was necessary; but this the court declined to rule, to which the defendant excepted."

But the "consideration," in the legal sense of the word, of a contract is the *quid pro quo*, that which the party to whom a promise is made does or agrees to do in exchange for the promise. In a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the consideration on the part of the assured is his payment of the whole

premium at the inception of the contract, or his payment of part then and his agreement to pay the rest at certain periods while it continues in force. In the present case, at least, the application is collateral to the contract, and contains no promise or agreement of the assured. The statements in the application are only representations upon which the promise of the insurer is based, and conditions limiting the obligation which he assumes. If they are false, there is a misrepresentation, or a breach of condition, which prevents the obligation of the insurer from ever attaching, or brings it to an end; but there is no breach of any contract or promise on the part of the assured, for he has made In short, the statements in this application limit the liability of the insurer, but they create no liability on the part of the assured. The expression at the beginning of the policy, that the insurance is made "in consideration of the representations made in the application for this policy," and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such.

Judgment affirmed.1

(iv.) Remedies for misrepresentation; estoppel.

STEVENS v. LUDLUM.

46 MINNESOTA, 160.-1891.

Action brought in the municipal court of Minneapolis, the complaint alleging that defendant was engaged in business under the name of the "New York Pie Company," and that on December 20, 1889, plaintiff drew a bill of exchange for \$100 upon defendant under that name, which was on the same day accepted by him, the acceptance being signed "New York Pie Company, E. J. White, Mgr." The answer was a general denial. At the trial (before the court, without a jury) there was evidence tend-

¹ In National Bank v. Union Ins. Co. (88 Cal. 497), the clause, "Fraud, false swearing, misrepresentation, or concealment of a material fact by the insured . . . shall render this policy void," was construed to mean intentional misstatements only.

ing to prove, and the court found, among other things, that the bill was drawn for the price of goods sold and delivered by plaintiff; that the goods were ordered by White in the name of the pie company, and, before delivering them, the plaintiff made inquiry at Bradstreet's and at Dun's commercial agencies (to which he was a subscriber), and was informed that the defendant was the proprietor of the business carried on in that name, and he relied on this information in making the sale; and that the information so given by the agencies had been received by them from defendant. Judgment was ordered for plaintiff, and the defendant appeals from an order refusing a new trial.

GILFILLAN, C. J. The facts found by the court below are sufficient to create an equitable estoppel against defendant as to the ownership of the concern doing business as the "New York Pie Company." To raise such an estoppel, it is not necessary that the representations should have been made with actual fraudulent intent. If he knows or ought to know the truth, and they are intentionally made under such circumstances as show that the party making them intended, or might reasonably have anticipated, that the party to whom they are made, or to whom they are to be communicated, will rely and act on them as true, and the latter has so relied and acted on them, so that to permit the former to deny their truth will operate as a fraud, the former is, in order to prevent the fraud, estopped to deny their truth. Coleman v. Pearce, 26 Minn. 123 (1 N. W. Rep. 846); Beebe v. Wilkinson, 30 Minn. 548 (16 N. W. Rep. 450). Nor need the representations be made directly to the party acting on them. is enough if they were made to another, and intended or expected to be communicated as the representations of the party making them to the party acting on them, for him to rely and act on. "The representation may be intended for a particular individual alone, or for several, or for the public, or for any one of a particular class, or it may be made to A, to be communicated to B. Any one so intended by the party making the representation will be entitled to relief or redress against him, by acting on the representation to his damage." Bigelow, Fraud, 445. If one act on a representation not made to nor intended for him, he will do so at his own risk. An instance of a right to act on a representation not made directly to the person acting on it, but intended for him if he had occasion to act on it, is furnished by Pence v. Arbuckle, 22 Minn. 417. The representations a business man makes to a bank or commercial agency, especially to the latter. relating to his business or to his pecuniary responsibility, are among those expected to be communicated to others for them to The business of a commercial agency is to get such information as it can relative to the business and pecuniary ability of business men and business concerns, and communicate it to such of its patrons as may have occasion to apply for it. Any one making representations to such an agency, relating to his business or to the business of any concern with which he is connected, must know, must be held to intend, that whatever he so represents will be communicated by the agency to any patron who may have occasion to inquire. His representations are intended as much for the patrons of the agency, and for them to act on, as for the agency itself. When the representations so made are communicated, as those of the person making them, to a patron of the agency, and he relies and acts on them, he is in position to claim an estoppel.

The findings of fact in the case are fully sustained by the evidence.

Order affirmed.

§ 3. Fraud.

- (i.) Essential features.
- a. Fraud is a false representation.

LAIDLAW v. ORGAN.

2 WHEATON (U. S.), 178.-1817.

Petition or libel for the possession of one hundred and eleven hogsheads of tobacco, and for the sequestration of the same pending the final decision of the court. Answer by defendants disclaiming any interest in the tobacco, and bill of interpleader by Boorman and Johnson, who claimed the ownership of the same. Writ of sequestration was granted, and on the trial a verdict was directed for the plaintiff, and final judgment entered for the possession of the tobacco, and for costs. Writ of error by defendants.

The bill of exceptions was in part as follows:

"And it appearing in evidence in the said cause, that on the night of the 18th of February, 1815, Messrs. Livingston, White, and Shepherd brought from the British fleet the news that a treaty of peace had been signed at Ghent, by the American and British commissioners, contained in a letter from Lord Bathurst to the Lord Mayor of London, published in the British newspapers, and that Mr. White caused the same to be made public, in a handbill, on Sunday morning, 8 o'clock, the 19th of February, 1815, and that the brother of Mr. Shepherd, one of these gentlemen, and who was interested in one-third of the profits of the purchase set forth in said plaintiff's petition, had on Sunday morning, the 19th of February, 1815, communicated said news to the plaintiff; that the said plaintiff, on receiving said news, called on Francis Girault (with whom he had been bargaining for the tobacco mentioned in the petition, the evening previous), said Francis Girault being one of the said house of trade of Peter Laidlaw & Co., soon after sunrise on the morning of Sunday, the 19th of February, 1815, before he had heard said news. Said Girault asked if there was any news which was calculated to enhance the price or value of the article about to be purchased; and that the said purchase was then and there made, and the bill of parcels annexed to the plaintiff's petition, delivered to the plaintiff, between 8 and 9 o'clock in the morning of that day; and that, in consequence of said news, the value of said article had risen from 30 to 50 per cent. There being no evidence that the plaintiff had asserted or suggested anything to the said Girault, calculated to impose upon him with respect to said news, and to induce him to think or believe that it did not exist; and it appearing that the said Girault, when applied to, on the next day, Monday, the 20th of February, 1815, on behalf of the plaintiff, for an invoice of said tobacco, did not then object to the said sale, but promised to deliver the invoice to the said plaintiff, in the course of the forenoon of that day; the court charged the jury to find for the plaintiff. Wherefore, that justice, by due course of law, may be done in this case, the counsel of said defendants, for them, and on their behalf, prays the court that this bill of exceptions be filed, allowed, and certified as the law directs.

"(Signed) DOMINICK A. HALL, District Judge.
"New Orleans, this 3d day of May, 1815."

MARSHALL, C. J. The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated

by him to the vendor? The court is of opinion, that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do anything tending to impose upon the other.

The court thinks that the absolute instruction of the judge was erroneous, and that the question, whether any imposition was practiced by the vendee upon the vendor, ought to have been submitted to the jury. For these reasons, the judgment must be reversed, and the cause remanded to the District Court of Louisiana, with directions to award a venire facias de novo.

Judgment reversed, and venire de novo awarded.1

1 "That case (Laidlaw v. Organ) seems to us to go as far as moral principles will justify, even in cases of that description, depending on public intelligence, and further than the same court seemed willing to go in the case of Etting v. Bank of United States, 11 Wheat. 59."—Mellin, C. J., in Lapish v. Wells, 6 Me. 175, 189. It should be noticed that Etting v. Bank of United States was a case of fraud on a surety. See also the criticism in Paddock v. Strobridge, 29 Vt. 470, and the explanation in Stewart v. Wyoming Ranche Co., 128 U. S. 383.

In Croyle v. Moses (90 Pa. St. 250), an action of deceit, the court says: "The question presented by the points was substantially, if at the time of the sale the horse was known to the defendant to be 'a cribber or windsucker,' and this fact was artfully concealed by him to the injury of the plaintiff, whether it was such a concealment of a latent defect as would avoid the contract. The points submitted did not rest on the mere facts that the horse was hitched short and the reasons assigned therefor, but also on the additional facts that the defendant knew him to be a crib-biter, and resorted to this artifice to conceal it, and gave an untruthful reason to mislead and deceive the plaintiff. The complaint is not for a refusal or omission to answer, but for an evasive and artful answer. . . . If the jury should believe, as the plaintiff testified, that he said to the defendant, 'If there is anything wrong with the horse, I do not want him at any price,' and that the defendant, with knowledge he was a crib-biter, answered the plaintiff artfully and evasively, with intent to deceive him, and did thereby deceive him to his injury, it was such a fraud on the plaintiff as would justify him in rescinding the contract." Cf. Dean v. Morey, 33 Ia. 120.

In Stewart v. Wyoming Ranche Co. (128 U. S. 383), the court says: "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; aliud est tacere, aliud celare; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or sup-

GRIGSBY v. STAPLETON.

94 MISSOURI, 423. - 1887.

BLACK, J. This was a suit in two counts. The first declares for the contract price of one hundred head of cattle sold by the plaintiff to the defendant. The second seeks to recover the value of the same cattle. The contract price, as well as the value, is alleged to have been \$3431.25. The answer is (1) a general denial; (2) a fraudulent representation as to the health and condition of the cattle; (3) fraudulent concealment of the fact that they had Spanish or Texas fever; (4) tender of their value in their diseased condition.

Plaintiff purchased one hundred and five head of cattle at the stock yards in Kansas City on Friday, July 25, 1884, at \$3.60 per He shipped them to Barnard on Saturday. hundred-weight. Mr. Ray, plaintiff's agent, attended to the shipment and accompanied the cattle. Ray says it was reported in the yards, before he left Kansas City, that the cattle were sick with Texas fever: some persons said they were sick and some said they were not. When the cattle arrived at Barnard, Ray told the plaintiff of the report, and that the cattle were in a bad condition; that one died in the yards at Kansas City before loading, and another died in the cars on the way. On Sunday morning the plaintiff started with them to his home. After driving them a mile or so, he says he concluded to and did drive them back to the yards, because they were wild. One of them died on this drive, and two more died in the pen at Barnard before the sale to defendant. There is much evidence tending to show that plaintiff drove the cattle back because he was afraid to take them to his neighborhood, and that he knew they were diseased, and dying from the fever. He

presses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

made no disclosure of the fact that the cattle were sick to defendant, nor that they were reported to have the fever. Defendant bargained for the cattle on Sunday afternoon and on Monday morning completed the contract at \$3.75 per hundred-weight, and at once shipped them to Chicago. Thirty died on the way, and twenty were condemned by the health officer. It is shown beyond all question that they all had the Texas fever.

The court, by the first instruction given at the request of the plaintiff, told the jury, that if

"Plaintiff made no representations to defendant as to the health or condition of said cattle to influence defendant to believe said cattle were sound or in healthy condition, but, on the contrary, defendant bought said cattle on actual view of the same and relying on his own judgment as to their health and condition, then the jury will find for plaintiff. And if the cattle were bought by the defendant in the manner above stated, it makes no difference whether said cattle, or any of them, were at the time of said sale affected with Texas fever or other disease, or whether plaintiff did or did not know of their being so diseased, as, under such circumstances, he would buy at his own risk and peril."

Caveat emptor is the general rule of the common law. If defects in the property sold are patent and might be discovered by the exercise of ordinary attention, and the buyer has an opportunity to inspect the property, the law does not require the vendor to point out defects. But there are cases where it becomes the duty of the seller to point out and disclose latent defects. Parsons says the rule seems to be, that a concealment or misrepresentation as to extrinsic facts, which affect the market value of the thing sold, is not fraudulent, while the same concealment of defects in the articles themselves would be fraudulent. 2 Pars. on Cont. (6th ed.) 775. When an article is sold for a particular purpose, the suppression of a fact by the vendor, which fact makes the article unfit for the purpose for which it was sold, is a deceit; and, as a general rule, a material latent defect must be disclosed when the article is offered for sale, or the sale will be avoided. 1 Whart. on Cont. sec. 248. The sale of animals which the seller knows, but the purchaser does not, have a contagious disease, should be regarded as a fraud when the fact of the disease is not disclosed. Cooley on Torts, 481. Kerr says: "Defects, however, which are latent, or circumstances materially affecting the subject matter of a sale, of which the purchaser has no means, or at least has no equal means of knowledge, must, if known to the seller, be disclosed." Kerr on Fraud and Mis. (Bump's ed.) 101.

In Cardwell v. McClelland (3 Sneed, 150) the action was for fraud in the sale of an unsound horse. The court had instructed that if the buyer relies upon his own judgment and observations, and the seller makes no representations that are untrue, or says nothing, the buyer takes the property at his own risk. This instruction was held to be erroneous, the court saying: "If the seller knows of a latent defect in the property that could not be discovered by a man of ordinary observation, he is bound to disclose it." In Jeffrey v. Bigelow (13 Wend. 518) the defendants, through their agent, sold a flock of sheep to the plaintiff; soon after the sale, a disease known as the scab made its appearance among the sheep. It was in substance said, had the defendants made the sale in person, and known the sheep were diseased, it would have been their duty to have informed the purchaser; and the defendants were held liable for the deceits

In the case of *McAdams* v. *Cates* (24 Mo. 223) the plaintiff made an exchange or swap for a filly, unsound from loss of her teeth. The court, after a careful review of the authorities, as they then stood, announced this conclusion: "If the defect complained of in the present case was unknown to the plaintiff, and of such a character that he would not have made the exchange had he known of it, and was a latent defect such as would have ordinarily escaped the observation of men engaged in buying horses, and the defendant, knowing this, allowed the plaintiff to exchange without communicating the defect, he was guilty of a fraudulent concealment and must answer for it accordingly." This case was followed and the principle reasserted in *Barron* v. *Alexander*, 27 Mo. 530. *Hill* v. *Balls* (2 H. & N. 299) seems to teach a different doctrine, but the cases in this court, supported as they are, must be taken as the established law of this State.

There is no claim in this case that the defendant knew these cattle were diseased. It seems to be conceded on all hands that

Texas fever is a disease not easily detected, except by those having had experience with it. The cattle were sold to the defendant at a sound price. If, therefore, plaintiff knew they had the Texas fever, or any other disease materially affecting their value upon the market, and did not disclose the same to the defendant, he was guilty of a fraudulent concealment of a latent defect. not necessary to this defense that there should be any warranty or representations as to the health or condition of the cattle. Indeed, so far as this case is concerned, if the cattle had been pronounced by some of the cattlemen to have the Texas fever, and, after knowledge of that report came to plaintiff, some of them to his knowledge died from sickness, then he should have disclosed these facts to the defendant. They were circumstances materially affecting the value of the cattle for the purposes for which they were bought, or for any other purpose, and of which defendant, on all the evidence, had no equal means of knowledge.

To withhold these circumstances was a deceit, in the absence of proof that defendant possessed such information. It follows that the first instruction is radically wrong, and that the second given at the request of the plaintiff is equally vicious.

The judgment is reversed and the cause remanded.1

b. The representation must be a representation of fact.

FISH v. CLELAND.

33 ILLINOIS, 237. - 1864.

Beckwith, J. The appellees filed a bill in chancery to set aside a sale made by them to the appellant of a life estate in a town lot in Jacksonville, on the ground of fraud. The specific

¹ See also Maynard v. Maynard (49 Vt. 297), where it was held a fraud to conceal the impotency of an animal purchased for breeding purposes; Brown v. Montgomery (20 N. Y. 287), where it was held a fraud for the vendors to conceal the insolvency of the makers of a check sold to the vendee. For a case showing a strict application of the maxim caveat emptor, see Beninger v. Corwin, 24 N. J. L. 257.

allegations on which relief is sought are: First. That the parties owning the remainder, held a meeting at Jacksonville, at which the appellant represented his wife, one of the owners, when it was concluded by them to file a bill in chancery for a partition of the property, and in order to facilitate the same it was deemed expedient to buy the life estate of Mrs. Cleland on joint account, at the price of \$2600 to \$2800, or thereabouts; that for this purpose the appellant, representing one of the joint owners, went to Rock Island, where Mrs. Cleland resided, and there purchased her life estate, fraudulently suppressing what had transpired between the joint owners of the remainder at Jacksonville. Second. That the appellant on that occasion fraudulently represented to Mrs. Cleland that the property could not be sold unless all the persons interested therein were willing; and that Hatfield, one of the joint owners, was not willing to have it sold, when he well knew that Hatfield wished it partitioned and sold. means of the suppression of what had transpired between the owners of the remainder, and these representations, the appellees allege that they were induced to sell the life estate in question for a grossly inadequate consideration.

In the present case it is not material to define the nature and extent of the appellant's obligation to the owners of the remainder. He may have been under obligation to act for them and not for himself, but their rights cannot be asserted by the appellees, and are not involved in the present controversy. It is mentioned in the bill that the appellant was the son-in-law of Mrs. Cleland, but it is not alleged that this relationship occasioned any confidence between the parties. There might have been such a confidence growing out of this relation as to authorize the appellees to act upon the presumption that there could be no concealment of any material fact from them, but a court of equity cannot afford relief on that ground in the absence of any allegation that the parties acted on such presumption, and where there is no evidence from which that fact can be inferred. Undue concealment which amounts to a fraud from which a court of equity will relieve, where there is no peculiar relation of trust or confidence between the parties, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to

communicate to the other, and which the latter has a right, not merely in foro conscientiæ, but juris et de jure, to know. 1 Story's Eq. § 207. The appellant was not required by this well-established rule to disclose that the joint owners of the remainder contemplated a partition and sale of the property, nor their estimate of the value of the life estate, nor the object of his visit to Rock Island. There is nothing shown in the case creating a legal or equitable obligation on his part to do so. The bill does not allege any misrepresentation of the value of the property or of the life estate therein, and we therefore dismiss from our consideration all the evidence in that regard. The allegata must exist before the court can consider the probata.

The representation of the appellant that the property could not be sold without all the parties interested therein consented, if understood to mean that a voluntary sale could not be made without such consent, was true, and one which every one must know was true; but if the representation was understood to mean that a sale could not be had by an order of court without the consent of all parties, then it was a representation in regard to the law of the land, of which the one party is presumed to know as much as the other. A representation of what the law will or will not permit to be done, is one upon which the party to whom it is made has no right to rely, and if he does so, it is his own folly, and he cannot ask the law to relieve him from the con-The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such. 5 Hill. We have not deemed it material to ascertain the truth or falsehood of the alleged representation that Hatfield was not willing the property should be sold. If untrue, it was only a misrepresentation in regard to the sellers' chance of sale, or the probability of their getting a better price for the property than the price offered by the appellant. Misrepresentations of this nature are not alone sufficient ground for setting aside a contract. 1 Sug. Vend. 7; 12 East, 637. Our duty is to administer the law, and having discharged it, we leave the parties before the tribunal of an enlightened public and to their own consciences. Our duty does not require us to become advocates for or against them before

those tribunals. The decree of the court below will be reversed, and the bill dismissed.

Decree reversed.1

[Again before the court and reported in 43 Illinois, 282, on the question of relation of trust and confidence.]

ROSS v. DRINKARD'S ADM'R.

35 ALABAMA, 434.-1860.

Action by administrator on two bills of exchange drawn by B. on defendant and by him accepted. Defense, that it was represented to defendant and to the drawer of the bill by the payee, that the bills were promissory notes and that defendant was signing as surety for B. Judgment for plaintiff. Defendant appeals.

A. J. Walker, C. J. . . . We do not deem it necessary to criticise the charges, as to what would constitute a fraud in the execution of the bill. We deem it sufficient for the guidance of the court upon a future trial to say that, if the person who took the bill, procured it by a false statement that it was an ordinary note, when he knew it to be a bill of exchange; and if the parties who gave the bill, did it in ignorance that it was a bill of exchange, and, trusting in the statement made to them, were misled by it, a fraud has been committed, and the defendant would be entitled to relief, to the extent of the injury done by the fraud, as against an indorsee who did not pay value. We think the law upon this point is correctly stated in Townsend & Milliken v. Cowles (31 Ala. 428) in the following words:

"If the defendant was in fact ignorant of the law, and the other party, knowing him to be so and knowing the law, took advantage of

¹ Accord: Duffany v. Ferguson, 66 N. Y. 482; Upton v. Tribilcock, 91 U. S. 45. "Trust and confidence reposed in a brother-in-law by his widowed sister-in-law requires the utmost good faith and fair dealing in any contract of sale between them. A misrepresentation of the law by the brother-in-law to his sister-in-law, whereby she is led to believe her title to property held by her is invalid, and on this account she sells it to him, which sale is much to his advantage, vitiates the sale at her election, even though such representation was made in good faith." — Sims v. Ferrill, 45 Ga. 585, 598.

such ignorance to mislead him by a false statement of the law, it would constitute a fraud."

It is conceivable that injury might result from a fraudulent representation that a bill of exchange was an ordinary promissory note; for, under our law, the incident of damages upon protest does not attach to notes, and the makers of such notes are not precluded from making defenses existing between the original parties, when they have passed into the hands of an innocent holder, as is the case with bills of exchange, which are governed by the commercial law.

The judgment of the court below is reversed, and the cause remanded.¹

DAWE v. MORRIS.

149 MASSACHUSETTS, 188. - 1889.

Tort. Defendant demurred. The Superior Court sustained the demurrer, and plaintiff appeals.

DEVENS, J. The alleged misrepresentations of the defendant, by which the plaintiff avers that he was induced to enter into a contract for building thirty miles of the Florida Midland Railway, are that the defendant had purchased a certain quantity of rails at a certain price, and that he would sell those rails to the plaintiff at the same price if he would make such contract. plaintiff's declaration alleges that the defendant had not then purchased the rails, and did not sell, and did not intend to sell, any rails so purchased to the plaintiff; and that by reason of the contract into which the plaintiff was induced to enter, he was obliged to purchase a large number of rails at a much higher price than that named by the defendant, to his great injury. formalities required by law in order that contracts for the sale and delivery of goods of the value here in question had been complied with, that these facts would constitute a contract upon a valuable consideration, will not be questioned. The plaintiff does not seek to recover upon this contract, but in an action of tort in the

¹ See also Moreland v. Atchison, 19 Tex. 303; Cooke v. Nathan, 16 Barb. (N. Y.) 342; Burns v. Lane, 138 Mass. 350.

nature of deceit, because he was induced to enter into the contract with the Florida Railway Company by reason of the representations above set forth.

A representation, in order that, if material and false, it may form the ground of an action where one has been induced to act by reason thereof, should be one of some existing fact. A statement promissory in its character that one will thereafter sell goods at a particular price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any further event, is not properly a representation, but a contract, for the violation of which a remedy is to be sought by action thereon. The statement by the defendant that he would thereafter sell rails at a particular price if the plaintiff would contract with the railway company was a promise, the breach of which has occasioned the injury to the plaintiff. *Knowlton v. Keenan*, 146 Mass. 86.

The plaintiff contends that, even if this is so, the representation that the defendant had thus purchased the rails at the price named was material and false; but if the allegation that the defendant had purchased the rails be separated from that of the promise to sell them to the plaintiff, it is seen at once to be quite unimportant and immaterial. Had the defendant actually sold, or had he been ready to sell, the rails at the time and price he promised that he would, no action could have been maintained by reason of any false representation that he had purchased them when he made his promise, and no possible injury could thereby have resulted to the plaintiff.

It is urged that, independent of any promise to sell to him, if the plaintiff had believed that the defendant had purchased rails at the price at which he said he had purchased them, the plaintiff might thus have been induced to believe that he himself could thereafter purchase them at the same price. But the injury from a false representation must be direct, and the probability or possibility that, because the defendant had purchased at a particular price, the plaintiff would be able, or might believe himself to be able, to do so also, is too remote to afford any ground for action.

It must be shown, not only that the defendant has committed

a tort and that the plaintiff has sustained damage, but that the damage is the clear and necessary consequence of the tort, and such as can be clearly defined and ascertained. Lamb v. Stone, 11 Pick. 527; Bradley v. Fuller, 118 Mass. 239. Quite a different case would be presented if the defendant had falsely represented to the plaintiff, if unskilled in the price of rails, what their market value then was, and what was the price at which they could then be purchased.

It is also said, that if the plaintiff believed that the defendant had actually purchased the rails, at the time of the transaction, and that if he knew that the completion of the railroad was of vital importance to the interests of the defendant, he would more readily have confided in the defendant's promise to sell them, and thus that this representation was material. But in order that a false representation may form the foundation of an action of deceit, it must be as to some subject material to the contract itself. If it merely affect the probability that it will be kept, it is collateral to it. "Representations as to matters which are merely collateral, and do not constitute essential elements of the contract into which the plaintiff is induced to enter, are not sufficient." Hedden v. Griffin, 136 Mass. 229.

Whether the allegation as to the purchase of the rails by the defendant was material was a question for the court, which was to construe the contract, and determine its legal effect on the duties and liabilities of the parties. It was for it to determine (there being on the declaration of the plaintiff no dispute as to the facts) whether the alleged misrepresentations were material, and such as would invalidate the contract or form the foundation of an action of tort. *Penn Ins. Co.* v. *Crane*, 134 Mass. 56.

The plaintiff further contends that, as when goods have been obtained under the form of a purchase with the intent not to pay for them, the seller may, on discovery of this, rescind the contract and repossess himself of the goods as against the purchaser or any one obtaining the goods from him with notice or without consideration, an action of tort should be maintained on an unfulfilled promise which, at the time of making, the promisor intended not to perform, by reason of which non-performance the plaintiff has suffered injury in having been induced to enter into

a contract which depended for its successful and profitable performance upon the performance by the defendant of his promise.

Assuming that the plaintiff's declaration enables him to raise this question, - which may be doubted, as the averment that "said defendant had not then purchased said rails, or any part of them, which the defendant then knew, and therefore did not sell, and did not intend to sell, said rails already purchased by them to the plaintiff," is not an averment that the defendant intended not to perform his contract,—there is an obvious difference between the case where a contract is rescinded, and thus ceases to exist, and one in which the injury results from the non-performance of that which it is the duty of the defendant to perform, and where there is no other wrong than such non-performance. To term this a tort would be to confound a cause of action in contract with one in tort, and would violate the policy of the statute of frauds by relieving a party from the necessity of observing those statutory formalities which are necessary to the validity of certain executory contracts.

It was not disputed that the plaintiff's declaration sets forth in the second count a good cause of action. The result is, that as to the first count the entry must be,

Judgment for the defendant affirmed.

SHELDON v. DAVIDSON.

85 WISCONSIN, 138. - 1893.

Action for deceit. Demurrer to complaint sustained. Plaintiff appeals.

The complaint set up that defendant leased to the plaintiff certain premises on the front of which there was a brick dwelling-house and store, and on the east sixty feet a barn, the lease stipulating that it should not take effect as to the east sixty feet until the expiration (six months later) of an existing lease between defendant and one Veidt; that plaintiff made due inquiry of defendant as to the terms and conditions of Veidt's lease, and that the defendant,

"With intent to deceive and defraud the plaintiff, and for the purpose of inducing him to sign said lease, falsely and fraudulently concealed from the plaintiff the fact that the barn standing upon the said east sixty feet [of said lot] was not the property of said defendant, but was the property of said Veidt, and that the plaintiff could not obtain possession thereof on the 10th day of September next ensuing, and falsely represented to the plaintiff, and for the purpose of inducing the plaintiff to execute said lease, that he could have possession of said sixty feet and the stable standing thereon on and after September 10th next ensuing; that the plaintiff, relying upon the said representations, was thereby induced to sign the aforesaid lease, and did so sign it within a few days thereafter."

The complaint further alleged that the representation was false in that the barn belonged to Veidt and was removed by him at the expiration of his lease. There was no stipulation in the lease regarding the buildings.

- ORTON, J. [After stating the above facts.] The gravamen of the complaint is the fraudulent concealment of the fact that the building on the east sixty feet of the lot was not the property of the defendant, but was the property of Veidt, the lessee; and the false representation that the plaintiff could have possession of the said sixty feet, and the stable standing thereon, on and after September 10th next ensuing.
- 1. As to the concealment as a cause of action. That barn on the sixty feet must have been placed there by the tenant, Veidt, temporarily for his own use, with the privilege of removal at the end of his term, and was never a part of the realty. It could not have been so attached to the soil as to become a part of the realty. If it had been, the plaintiff would have been entitled to it by the terms of his lease, and he could have prevented its removal. We conclude, therefore, that the barn was a tenant's fixture in fact as well as by the terms of the Veidt lease, and removable by him during his term. The Veidt lease is referred to in the plaintiff's lease. The plaintiff does not state that he did not know all about that lease, and all about the character of that building as having been placed there by the tenant, and removable. He states only that he inquired of the defendant about the terms and conditions of that lease, and does not state whether the defendant told him what they were or not. He does not state

that the defendant knew, or had reason to know, that he, the plaintiff, was ignorant of the fact that the defendant did not own the barn. The defendant might well have supposed that the plaintiff knew the terms of that lease referred to in his own lease, and the character of the barn as a fixture was open to common observation. But more material than even this is the absence of any averment that the plaintiff was induced to sign the lease by such fraudulent concealment. It states merely that the concealment was for the purpose of inducing him to do so, but fails to state that he was actually induced to do so by it. It is very clear that there are not sufficient allegations in the complaint to make the fraudulent concealment a cause of action.

2. As to the false representation that the plaintiff "could have possession of said east sixty feet, and the stable standing thereon, on and after September 10th next ensuing." The plaintiff did have possession of the sixty feet, so that such part of the representation at least was not false. As to the other part of the representation, it relates to a future event, and is not of an existing fact or of a past event, and therefore is not actionable if such event should not occur. It is a mere opinion, prediction, or promise of a future condition of things, upon which the plaintiff had no right to rely. In Morrison v. Koch (32 Wis. 254) the representation was that a certain dam "would always in the future continue to furnish the full amount of power conveyed." Mr. Justice Lyon said in the opinion: "It seems quite clear that no charge of fraud can be predicated upon it. At most there was a mere expression of opinion that in the future the conditions on which the water supply depended would remain favorable to a continuance of the supply. . . . It is wanting in all the essential elements which constitute a fraud." In Patterson v. Wright (64 Wis. 289) the representation was that the party "said or promised that he would pay a certain sum of money as a consideration of and to induce the giving of certain notes, and upon which they were obtained." It was held "that the representation must relate to a present or past state of facts, and that relief as for deceit cannot be obtained for the non-performance of a promise or other statement looking to the future;" citing the above case, Bigelow, Frauds, 11, 12, and Fenwick v. Grimes, 5

Cranch C. C. 439. In Maltby v. Austin (65 Wis. 527) the representation was "of the value of a certain tract of land," and in Prince v. Overholser (75 Wis. 646) it was "that a certain bounty land warrant would locate any kind of government land," and neither was held actionable. The principle has become elementary in respect to all representations relating to the future and as mere expressions of opinion. This representation is not fraudulent or actionable for both reasons. It relates to a future event, and is a mere opinion, viz., "that the plaintiff could have possession of the building on the east sixty feet of the lot on and after September 10th next ensuing." This statement was made before March 16, 1891.

This disposes of all the pretended deceit or fraud alleged in the complaint. The demurrer was properly sustained.

By the court. The order of Superior Court is affirmed, and the cause remanded for further proceedings according to law.

c. The representation must be made with knowledge of its false-hood or without belief in its truth.

CHATHAM FURNACE CO. v. MOFFATT.

147 MASSACHUSETTS, 403. - 1888.

Tort for false and fraudulent representations made by the defendant, whereby the plaintiff was induced to take a lease of a mine, and to purchase certain mining machinery. Judgment for plaintiff.

C. Allen, J. It is well settled in this commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist,

he must ordinarily be deemed to know that he does not. getfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this commonwealth, and rests alike on sound policy and on sound legal principles. Cole v. Cassidy, 138 Mass. 437; Savage v. Stevens, 126 Mass. 207; Tucker v. White, 125 Mass. 344; Litchfield v. Hutchinson, 117 Mass. 195; Milliken v. Thorndike, 103 Mass. 382; Fisher v. Mellen, 103 Mass. 503; Stone v. Denny, 4 Met. 151; Page v. Bent, 2 Met. 371; Hazard v. Irwin, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, amongst others: Cooper v. Schlesinger, 111 U. S. 148; Bower v. Fenn, 90 Penn. St. 359; Brownlie v. Campbell, 5 App. Cas. 925. 953, by Lord Blackburn; Reese River Mining Co. v. Smith, L. R. 4 H. L. 64, 79, 80, by Lord Cairns; Slim v. Croucher, 1 De G., F. & J. 518, by Lord Campbell. See also Peek v. Derry, 59 L. T. (N. S.) 78, which has been published since this decision was announced.

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water The defendant sought to sell this lease to the plainand debris. tiff, and represented to the plaintiff, as of his own knowledge. that there was a large quantity of iron ore, from 8000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out, and visible when the bed was free from water and debris. material point was, whether this mass of iron ore, which did in truth exist under the ground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was, that this was in his ore bed; and the representations were not in fact true in this, that while in a mine connecting with the defendant's shafts there was ore sufficient in quantity and location relative to drifts to satisfy his representations, if it had been in the land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine; and the defendant's mine was in fact worked out.

During the negotiations, the defendant exhibited to the plaintiff a plan of a survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

The case of *Milliken* v. *Thorndike* (103 Mass. 382) bears a considerable resemblance to the present in its facts. That was an action by a lessor to recover rent of a store, which proved unsafe, certain of the walls having settled or fallen in shortly after the execution of the lease. The lessor exhibited plans, and, in reply

to a question if the drains were where they were to be according to the plans, said that the store was built according to the plans in every particular; but this appeared by the verdict of the jury to be erroneous. The court said, by Mr. Justice Colt, that the representation "was of a fact, the existence of which was not open and visible, of which the plaintiff (the lessor) had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury."

In respect to the rule of damages, the defendant does not in argument contend that the general rule adopted by the judge was incorrect, but that it does not sufficiently appear what considerations entered into his estimate. No requests for rulings upon this subject were made, and there was no error in the course pursued by the judge.

Exceptions overruled.1

McKOWN v. FURGASON.

47 IOWA, 636.—1878.

Action for deceit in the sale of a note. Judgment for plaintiff. Defendant appeals.

DAY, J. The court instructed the jury as follows:

"3. If [you find that] at the time defendant sold the note in question to the plaintiff, he represented said note was good, and that the maker

¹ Accord: Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486; Dulaney v. Rogers, 64 Mo. 201; Haven v. Neal, 43 Minn. 315.

That a defendant is not liable in an action for deceit where the misrepresentation was made innocently, see Cowley v. Smyth, 46 N. J. L. 380; Da Lee v. Blackburn, 11 Kans. 150; Tucker v. White, 125 Mass. 344; Wakeman v. Dalley, 51 N. Y. 27. Contra: Holcomb v. Noble, 69 Mich. 396; Davis v. Nuzum, 72 Wis. 439, in which States no such distinction is taken.

If an independent action of deceit could not be maintained, it would seem that a claim for damages for deceit could not be interposed as a defense to an action for the price. *McIntyre* v. *Buell*, 132 N. Y. 192; *King* v. *Eagle Mills*, 10 Allen, 548; *First N. B.* v. *Yocum*, 11 Neb. 328. *Contra: Mulvey* v. *King*, 39 Ohio St. 491; *Loper* v. *Robinson*, 54 Tex. 510.

But it would be a defense to an action for damages for breach of a bilateral contract. School Directors v. Boomhour, 83 Ill. 17, ante, p. 271.

thereof, H. E. Stewart, was solvent; that the plaintiff relied upon said representations in purchasing said note; and that said representations were untrue at the time they were made; and that said defendant knew they were nntrue, or had no reasonable grounds for believing them true, your verdict should be for the plaintiff for the amount paid for said note, together with six per cent interest from the date of said payment."

The giving of this instruction is assigned as error. It was not proper to give this instruction under the issues presented. The plaintiff claims of defendant damages for fraudulently making representations, with full knowledge when he made them that they were false. Upon this question the case of *Pearson* v. *Howe* (1 Allen, 207) is directly in point. In that case it was held that in an action for deceit a declaration which alleges that the representations made were well known by defendant to be untrue is not supported by proof, simply, that the defendant had reasonable cause to believe that they were untrue.

Judgment reversed.1

1 "The plaintiff requested the court to charge that if the defendant knew or had reason to believe there was not one hundred and twentyfive acres of land, he was guilty of fraud in representing that there was that quantity. The court declined to adopt that precise language, but repeated what had been previously said, that if defendant, intending to cheat and defrand, misrepresented or concealed a material fact, he was liable for the wrong. The request was erroneous. It sought to substitute for the fraudulent intent a fact which might or might not, in the minds of the jury, establish that intent. The defendant might have had reason to believe that there was less than one hundred and twenty-five acres of land, and yet not have believed it, but have honestly believed the reverse. The cases cited in support of the request to charge, when carefully read, are found to guard against any such misapprehension. (Meyer v. Amidon, 45 N. Y. 169; Wakeman v. Dalley, 51 Id. 27.) They treat the fact that one 'has reason to believe' his statement to be false merely as evidence tending to prove the fraudulent intent, and require that intent to be established. The court applied the needed correction to the request, and declined to make conclusive as matter of law what was properly but evidence upon the question of fact." - Finch, J., in Salisbury v. Howe, 87 N. Y. 128, 135.

d. The representation must be made with the intention that it should be acted upon by the injured party.

STEVENS v. LUDLUM.

46 MINNESOTA, 160. - 1891.

[Reported herein at p. 280.]

HUNNEWELL v. DUXBURY.

154 MASSACHUSETTS, 286. - 1891.

BARKER, J. The action is tort for deceit, in inducing the plaintiff to take notes of a corporation by false and fraudulent representations, alleged to have been made to him by the defendants, that the capital stock of the corporation, amounting to \$150,000, had been paid in, and that patents for electrical advertising devices, of the value of \$149,650, had been transferred to it.

From the exceptions, it appears that the corporation was organized in January, 1885, under the laws of Maine, and engaged in business in Massachusetts; that it filed with the commissioner of corporations a certificate containing the above statements, dated August 11, 1885, as required by the St. of 1884, c. 330, § 3, signed by the defendants, with a jurat stating that on that date they had severally made oath that the certificate was true, to the best of their knowledge and belief; that before the plaintiff took the notes the contents of this certificate had been communicated to him by an attorney whom he had employed to examine the records; and that he relied upon its statements in accepting the notes. There was no other evidence of the making of the alleged representations.

The main question, which is raised both by the demurrer to the second count of the declaration and by the exception, is whether the plaintiff can maintain an action of deceit for alleged misstatements contained in the certificate. In the opinion of a majority of the court this question should have been decided adversely to the plaintiff. The execution by the defendants of

the certificate to enable the corporation to file it under the St. of 1884, c. 330, § 3, was too remote from any design to influence the action of the plaintiff to make it the foundation of an action of deceit.

To sustain such an action, misrepresentations must either have been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains.

This certificate was not communicated by the defendants, or by the corporation, to the public or to the plaintiff. It was filed with a state official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was not to procure credit among merchants, but to secure the right to transact business in the State.

The terms of the statute carry no implication of such a liability. Statutes requiring similar statements from domestic corporations have been in force here since 1829, and whenever it was intended to impose a liability for false statements contained in them there has been an express provision to that effect; and a requisite of the liability has uniformly been that the person to be held signed knowing the statement to be false. St. 1829, c. 53, § 9; Rev. Sts. c. 38, § 28; Gen. Sts. c. 60, § 30; St. 1870, c. 224, § 38, cl. 5; Pub. Sts. c. 106, § 60, cl. 5. To hold that the St. of 1884, c. 330, § 3, imposes upon those officers of a foreign corporation who sign the certificate, which is a condition of its admission, the added liability of an action of deceit, is to read into the statute what it does not contain.

If such an action lies, it might have been brought in many instances upon representations made in returns required of domestic corporations, and yet there is no instance of such an action in our reports. In Fogg v. Pew (10 Gray, 409) it is held that the misrepresentations must have been intended and allowed by those making them to operate on the mind of the party induced, and have been suffered to influence him. In Bradley v. Poole (98 Mass. 169) the representations proved and relied on were made personally by the defendant to the plaintiff, in the

course of the negotiation for the shares the price of which the plaintiff sought to recover. Felker v. Standard Yarn Co. (148 Mass. 226) was an action under the Pub. Sts. c. 106, § 60, to enforce a liability explicitly declared by the statute.

Nor do we find any English case which goes to the length necessary to sustain the plaintiff's action. The English cases fall under two heads: 1. Those of officers, members, or agents of corporations, who have issued a prospectus or report addressed to and circulated among shareholders or the public for the purpose of inducing them to take shares. 2. Those of persons who, to obtain the listing of stocks or securities upon the stock exchange in order that they may be more readily sold to the public, have made representations to the officials of the exchange, which in due course have been communicated to buyers. Bagshaw v. Seymour, 32 L. T. 81; Bedford v. Bagshaw, 4 H. & N. 538; Watson v. Earl of Charlemont, 12 Q. B. 856; Clarke v. Dickson, 6 C. B. (N. S.) 453; Jarrett v. Kennedy, 6 C. B. 319; Campbell v. Fleming, 1 A. & E. 40; Peek v. Derry, 37 Ch. D. 541, and 14 App. Cas. 337; Angus v. Clifford (1891), 2 Ch. 449. In these cases the representations were clearly addressed to the plaintiffs among others of the public or of a class, and were plainly intended and calculated to influence their action in the specific matter in which they claimed to have been injured. So, too, in the American cases relied on to support the action. Morgan v. Skiddy, 62 N. Y. 319; Terwilliger v. Great Western Telegraph Co., 59 Ill. 249; Paddock v. Fletcher, 42 Vt. 389. The numerous cases cited in the note to Pasley v. Freeman, in 2 Smith's Lead. Cas. (9th Am. ed.) 1320, are of the same character.

In the case at bar, the certificate was made and filed for the definite purpose, not of influencing the public, but of obtaining from the State a specific right, which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney. It could not have been intended or designed by the defendants that the plaintiff should ascertain its contents and be induced by them to take the notes. It is not such a representation, made by one to another with intent to deceive, as will sus-

tain the action. Its statements are in no fair sense addressed to the person who searches for, discovers, and acts upon them, and cannot fairly be inferred or found to have been made with the intent to deceive him.

This view of the law disposes of the case, and makes it unnecessary to consider the other questions raised at the trial.

Demurrer and exceptions sustained.1

e. The representation must actually deceive.

LEWIS v. JEWELL.

151 MASSACHUSETTS, 345.-1890.

Tort, by the administratrix of the estate of Edward Lewis, for false and fraudulent representations made by the defendant to the intestate in a sale of carpets represented to amount to 900 yards, which in fact amounted to only 595 yards. Exceptions by defendant to refusal of court to charge that if intestate had full means of ascertaining the number of yards and had an opportunity to inspect and measure them, the representations of defendant, though false and intentional, would not entitle plaintiff to recover, and to the charge of the court that if defendant made an intentional false representation to induce the intestate to purchase, and if the intestate, in the exercise of due care, relied on it, the jury would be justified in finding for the plaintiff. Verdict for the plaintiff.

Knowlton, J. The carpets bought by the plaintiff's intestate covered four floors, consisting of twelve rooms, besides the hall and stairs, in a dwelling-house. The number of yards of material contained in them was an important element in determining their value, which might be the subject of a fraudulent representation. The representation of the defendant was not a mere estimate, but a statement purporting to be made as of her own knowledge, and there was evidence tending to show that it was known by her to

¹ See also Nash v. Minnesota &c. Co., 159 Mass. 437; Eaton v. Avery, 83 N. Y. 31.

be false. There was also evidence that the purchaser relied upon it; and if the testimony introduced by the plaintiff was true, the defendant was liable for fraud, unless the purchaser was bound to measure the carpets for himself, or to avail himself of his other opportunities of ascertaining the quantity.

Upon the evidence presented, it could not properly have been ruled, as matter of law, that the facts were so obvious or so easily discoverable that the plaintiff's intestate had no right to rely on the defendant's representations. In this commonwealth, and in other American States, in regard to representations by a vendor in a sale of land, it has been held that, in the absence of other fraud, a vendee to whom boundaries are pointed out has no right to rely on the vendor's statements as to quantity, but if he deems the quantity material, he should ascertain it for himself. Gordon v. Parmelee, 2 Allen, 212; Noble v. Googins, 99 Mass. 231, and cases cited; Parker v. Moulton, 114 Mass. 99. We are of opinion that this rule should not be extended so as to include a case like the present, and that the instructions under which the questions were submitted to the jury were correct and sufficient.

Exceptions overruled.

1 "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and has been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained." — Mr. Justice Field, in Slaughter's Adm'r v. Gerson, 13 Wall. (U. S.) 379, 383.

For an extreme application of the above rule, see Long v. Warren, 68 N. Y. 426, and see the criticisms on it in Albany City Savings Institution v. Burdick, 87 N. Y. 40, and Schumaker v. Mather, 133 N. Y. 590. See also Sheldon v. Davidson, 85 Wis. 138, ante, p. 295.

§ 4. Duress.

MORSE v. WOODWORTH.

155 MASSACHUSETTS, 233. - 1892.

Action of contract to recover the amount of three promissory notes given by defendant to plaintiff, and delivered up to defendant by plaintiff and mutual releases executed under threats of prosecution and arrest on a criminal charge of embezzling defendant's money.

The court charged the jury in substance that to constitute duress by threats of imprisonment the threats must be such as actually overcame the will of the plaintiff, and that in testing the question the jury might consider whether they were such as would overcome the will of a man of ordinary firmness; and refused to charge, at the request of defendant, that if the defendant believed plaintiff had wrongfully taken money belonging to defendant, and no civil or criminal proceeding had been begun, that mere threats of prosecution or arrest would not constitute duress, that mere threats of criminal prosecution or arrest, when no warrant has been issued or proceedings commenced, do not constitute duress. The court referred to the ambiguity in the word "mere," and reiterated its former charge. Defendant excepted. Verdict for plaintiff.

Knowlton, J. . . . The only remaining exceptions relate to the requests of the defendant and the rulings of the court in regard to duress. The plaintiff contended that he gave up the notes and signed the release under duress by threats of imprisonment. The question of law involved is whether one who believes and has reason to believe that another has committed a crime, and who, by threats of prosecution and imprisonment for the crime, overcomes the will of the other, and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress.

Duress at the common law is of two kinds, duress by imprisonment and duress by threats. Some of the definitions of duress per minas are not broad enough to include constraint by threats of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress, as well as threats of grievous bodily harm. The rule as to duress per minas has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily.

To set aside a contract for duress it must be shown, first, that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect. must also be shown that the other party to the contract is not, through ignorance of the duress or for any other reason, in a position which entitles him to take advantage of a contract made under constraint without voluntary assent to it. If he knows that means have been used to overcome the will of him with whom he is dealing, so that he is to obtain a formal agreement which is not a real agreement, it is against equity and good conscience for him to become a party to the contract, and it is unlawful for him to attempt to gain a benefit from such an influence improperly exerted.

A contract obtained by duress of unlawful imprisonment is voidable. And if the imprisonment is under legal process in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution

of a contract; and a contract obtained by means of it is voidable for duress. So it has been said that imprisonment under a legal process issued for a just cause is duress that will avoid a contract if such imprisonment is unlawfully used to obtain the contract. Richardson v. Duncan, 3 N. H. 508. See also Foshay v. Ferguson, 5 Hill (N. Y.), 154; United States v. Huckabee, 16 Wall. 414, 431; Miller v. Miller, 68 Penn. St. 486; Walbridge v. Arnold, 21 Conn. 424; Wood v. Graves, 144 Mass. 365, and cases cited.

It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is, whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his, but another's.

We are aware that there are cases which tend to support the contention of the defendant. Harmon v. Harmon, 61 Maine, 227; Bodine v. Morgan, 10 Stew. 426, 428; Landa v. Obert, 45 Texas, 539; Knapp v. Hyde, 60 Barb. 80. But we are of opinion that the view of the subject heretofore taken by this court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions in such cases, both in England and America. Hackett v. King, 6 Allen, 58; Taylor v. Jaques, 106 Mass. 291; Harris v. Carmody, 131 Mass. 51; Bryant v. Peck & Whipple Co., 154 Mass. 460; Williams v.

Bayley, L. R. 1 H. L. 200; S. C., 4 Giff. 638, 663, note; Eadie v. Slimmon, 26 N. Y. 9; Adams v. Irving National Bank, 116 N. Y. 606; Foley v. Greene, 14 R. I. 618; Sharon v. Gager, 46 Conn. 189; Bane v. Detrick, 52 Ill. 19; Fay v. Oatley, 6 Wis. 42.

We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress. merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note. But if the fact that he is liable to arrest and imprisoument is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is, whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement. The rulings and refusals to rule were correct. Exceptions overruled.

§ 5. Undue influence.

HALL v. PERKINS.

3 WENDELL (N. Y.), 626. - 1829.

Bill in equity against defendants, as executors, for an account-Decree for an accounting. Defendants appeal.

Complainant when nine years old was apprenticed to his maternal grandfather, the testator, it being agreed that he should serve until he was twenty-one and should then receive the sum of After he became twenty-one the testator deeded to him forty acres of land, the deed being executed on an election day in order to make complainant a voter. The deed recited the consideration of \$500 and reserved a rent, but was never delivered. After the death of the testator, a settlement took place between defendant, G. H., an uncle of complainant, and the complainant, at which it was agreed that the land should be taken in payment of the \$500 and a further sum of \$39.58 should be paid complainant for services rendered after he arrived at age. In pursuance of this agreement defendants gave complainant a quit-claim deed of the land and the sum mentioned and complainant gave defendants a receipt in full of all claims against the estate.

SAVAGE, C. J. This is a short and simple case, addressing itself to the common sense and common justice of the plainest man, and seems to require no legal learning to decide it. deed from the testator to the complainant when executed was a fraud upon the elective franchise; it conveyed no estate, for it was never delivered by the grantor. It was not considered by him as a compensation for services, for he spoke of it as a gift, and at the same time admitted he owed the complainant \$500. There can be no dispute that at the death of Rowland Hall the estate honestly owed Perkins \$500. How has this acknowledged debt of \$500 been paid? I answer by compelling or persuading this simple and ignorant young man to receive the forty acres of rocks in compensation for his services. The land is estimated by some of the witnesses at \$4, and by others at \$8 or \$9; a fair medium is \$6. We may therefore consider the land worth \$6 per acre, amounting to \$240, which these uncles gave their nephew instead of \$500 and about two years' interest.

It is said that inadequacy alone is no evidence of fraud. has indeed been so decided; but inadequacy here does not stand The contracting parties and their capacities should also be considered: on the one side, a simple, uneducated boy, who knew only how to work on a farm; on the other, a man who had been a justice of the peace, and therefore may be presumed to have some knowledge of law. He was no longer a justice, but his practice was that of advocating causes before justices, and probably he was not unacquainted with the tricks and quibbles which too often disgrace inferior tribunals, and bring a reproach upon that branch of our jurisprudence. The inadequacy then consists, 1. In conveying 40 acres of mountain rocks, worth \$240, in satisfaction of a debt of about \$565, much less than half; 2. One of the contracting parties arrived at mature age, perfectly acquainted with the value of property, and from his very "vocation," in the habit of taking every advantage which the law would permit; the other an ignorant, simple, unsuspecting bov.

unacquainted with property and with the arts and intrigues which too often attend more advanced age; 3. On the one side the uncle, and the other the nephew. The grandfather had hitherto been the guardian and guide of the complainant; and after his decease, to whom could this ignorant youth more naturally look for advice and protection than to his mother's brother, the executor of his grandfather's will, as one every way capable of advising him? The result, however, shows that there was some reason in the ancient law which refused to relations, who might inherit from minors, the guardianship of their persons, because it was, as Lord Coke says, "quasi agnum lupo committere ad devorandum." I have thus far cited no authority; it seems to me that none can be necessary beyond an appeal to the moral sense.

It is contended by the appellants that there is not in the bill a sufficient allegation of fraud to justify the admission of evidence on that subject, and if there be a sufficient allegation, there is no evidence of fraud. The bill charges, that if the defendants should produce a receipt in full from the complainant, that such receipt was fraudulently and unjustly obtained. This is sufficient. The ground of the plaintiff's claim was matter of contract, and he resorted to a court of equity because the written contract signed by Rowland Hall was lost or destroyed; the allegation of fraud was in anticipation of the defense contemplated, and it seems to me when thus set up, it need not be so full as if made the substantive ground of complaint. Had the plaintiff below been in possession of the written contract, he might have sued in a court of law, and the question of fraud might have been inquired into in rebutting the defense.

Fraud is often the subject of inquiry in a court of law as well as in equity; there is this difference, however, that at law fraud must be proved; it must be what Lord Hardwicke calls dolus malus, actual fraud arising from facts and circumstances of imposition. At law, the contract of every man who is compos mentis, is binding and cannot be avoided in general without proof of actual fraud in obtaining it. Neither will a court of equity measure the extent of men's understandings and say there is an equitable incapacity where there is a legal capacity; yet if a weak

man gives a bond for a pretended consideration, when in truth there was none or not near so much as is pretended, equity will relieve against it. 3 P. W. 130, 131. Fraud is sometimes also apparent from the intrinsic nature of the contract. It may be such as no man in his senses and not under delusion would make, and such as no honest and fair man would accept, which is Lord Hardwicke's second class of frauds; and his third is that which may be presumed from the circumstances and condition of the parties contracting. 2 Vesey, Sen. 155, 156.

This case partakes of both the two last classes of frauds, if not of the first. Here was a contract made which no sensible man not under delusion would make, on the one hand, and which no man who had not lost all consciousness of shame would accept, on the other. One of the parties was a weak boy, the other a man of capacity, who may be presumed, from the circumstances of this case, an artful intriguer in small matters. It was a contract made by an unsuspecting youth with a man in whom, from the connection existing between them, he must have reposed confidence, and to whom he naturally looked for advice and protection. It is clearly a case, therefore, where from the nature of the transaction and the situation of the parties, fraud and imposition are to be presumed. 4 Cowen, 220.

I am of opinion the decree of his honor the chancellor should be affirmed with costs.

Mr. Senator S. Allen also delivered an opinion in favor of an affirmance of the decree.

And this being the unanimous opinion of the court, the decree of the chancellor was accordingly affirmed, with costs to be paid by the appellants.¹

¹ See also Fish v. Cleland, 33 III. 237, ante, p. 288; S. C., 43 III. 282. The relation of an alleged spiritualistic medium to one relying on such medium for advice, and believing implicitly in the existence of the medium's professed power, is one of trust and confidence, and throws on the medium the burden of showing that a contract between the two is free from undue influence. Connor v. Stanley, 72 Cal. 556.

CHAPTER V.

LEGALITY OF OBJECT.

- § 1. Nature of illegality in contract.
 - (i.) Contracts which are made in breach of statute.
 - a. General rules of construction.

PANGBORN v. WESTLAKE.

36 IOWA, 546.—1873.

Action to foreclose a mortgage given by Westlake and wife to Pangborn, to secure the payment of a note.

The defendant Westlake, by his answer, admitted the due execution of the note and mortgage, and that the same was executed to secure the purchase money of the real estate therein described; and also averred that the sale and conveyance of said real estate made by plaintiff to defendant was illegal and contrary to the statute; that the lots sold were embraced in an addition to Maquoketa, which was laid out and platted prior to the sale, but was neither acknowledged or recorded, or filed for record previous to the sale as required by law. To this answer the plaintiff demurred, because the matters contained therein did not constitute any defense to the action. The demurrer was sustained by the court. The defendant appeals, and here assigns that ruling as error.

COLE, J. The single question presented by the demurrer is, whether the contract for the sale of a lot in a town or city, or addition thereto, the plat of which has not been recorded, is void, so that no right of action can be based thereon. Our statute enacts (Rev. § 1027):

"That any person or persons who shall dispose of, or offer for sale or lease, for any time, any out or in lots, in any town, or addition to any

town or city, or any part thereof, which has been or shall hereafter be laid out, until the plat thereof has been duly acknowledged and recorded, as provided for in chapter 41 of the Code of Iowa, shall forfeit and pay \$50 for each and every lot or part of lot sold or disposed of, leased, or offered for sale."

There is no doubt that the well-settled general rule is that when a statute prohibits or attaches a penalty to the doing of an act, the act is void and will not be enforced, nor will the law assist one to recover money or property which he has expended in the unlawful execution of it; or, in other words, a penalty implies a prohibition though there are no prohibitory words in the statute, and the prohibition makes the act illegal and void. Vinor, Carth. 252; Lyon v. Strong, 6 Vt. 219; Robeson v. French, 12 Metc. (Mass.) 24; Gregg v. Wyman, 4 Cush. 322; Pattee v. Greely, 13 Metc. (Mass.) 284; Etna Ins. Co. v. Harvey, 11 Wis. 394; Miller v. Larson, 19 Id. 463; Pike v. King, 16 Iowa, 50, and cases cited; Cope v. Rowlands, 2 Mees. & Welsb. 149, and very numerous other cases there cited. But, notwithstanding this general rule, it must be apparent to every legal mind, that when a statute annexes a penalty for the doing of an act, it does not always imply such a prohibition as will render the act void. Suppose, for instance, the act itself expressly provided that the penalty annexed should not have the effect of rendering the act void. Surely in such case the courts would not give such force to the legal implication, under the general rule above quoted, as to override the express negation of it in the statute Then, upon this conclusion, we are prepared for the next step, which is equally plain, that if it is manifest from the language of the statute, or from its subject matter and the plain intent of it, that the act was not to be made void, but only to punish the person doing it with the penalty prescribed, it is equally clear that the courts would readily construe the statute in accordance with its language and its plain intent. therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from

all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly. The following cases will abundantly vindicate as well as illustrate this statement of the law: Fergusson v. Norman, 5 Bingham's New Cases, 76 (opinion of Tindal, C. J., p. 83); S. C. in 35 E. C. L. Rep. 37 (i.e. 40); Harris v. Runnels, 12 How. (U. S.) 79; Johnson v. Hudson, 11 East, 180; Brown v. Duncan, 10 Barn. & Cress. 93; Hodgson v. Temple, 5 Taunt. 181; Fackler v. Ford et. al., 24 How. (U. S.) 322; The Oneida Bank v. The Ontario Bank, 21 N. Y. 490 (see opinion by Comstock, C. J., on p. 495).

We are relieved from the necessity of making an analysis of and construing our statute as an original interpretation of it, because our statute above quoted, like our general municipal incorporations act, was taken from the Ohio statute, and is essentially the same as that. See Swan's Rev. Stat. of Ohio, Derby's edition, 1854, § 10, p. 940. Prior to our adoption of that statute, it had received a judicial construction by the Supreme Court of that State, and it was held that the penalty did not render the contract illegal, so as to prevent a recovery by the vendor of the consideration agreed to be paid by the vendee, for a lot sold him prior to the proper survey and making and recording of the plat. Strong &c. v. Darling, 9 Ohio, 201. And it is a well-settled rule that when the legislature of one State adopts a statute from another which has received judicial construction there, such construction will be presumed to have been known to and approved by the legislature, and will be followed by the courts of the State adopting the statute. See Bemis v. Becker, 1 Kan. 226 (i.e. 249), where the rule was applied to a statute like the one now in ques-Under this rule we must hold that the note and mortgage in this case are not illegal and may, therefore, be enforced.

There are two cases in Missouri, to which our attention has been called, construing a statute similar to ours: Downing v. Ringer, 7 Mo. 585, and Mason v. Pitt, 21 Id. 391. In the former, and apparently without much investigation, it was held, under the general rule first above stated, that the penalty rendered the contract illegal, and that the vendor of a lot in an unrecorded plat could not, under the Missouri statute, recover from the

vendee the consideration agreed to be paid therefor. In the last case it was held, that the failure to record the plat prior to the conveyance, did not prevent the title from passing to the vendee. The Kansas court, in *Bemis* v. *Becker*, *supra*, followed the last, without referring to the former.

But, further than this, the question has been, in effect, determined by this court in Watrous & Snouffer v. Blair (32 Iowa, 58), where it was held, that the vendees of certain lots, having, as in this case, actual knowledge that at the time of their purchase the plat had not been recorded, were entitled to a specific performance, by their vendor, of their contract of purchase. Surely, we could hardly be expected to compel a vendor to convey, and then to deny him the right to recover the consideration for such conveyance. In that case we required the conveyance to the vendee; in this, we enforce the payment by the vendee.

Affirmed.1

b. Contracts in breach of Sunday statutes.

HANDY v. ST. PAUL GLOBE PUBLISHING CO.

41 MINNESOTA, 188. - 1889.

GILFILLAN, C. J. The action is upon a contract pleaded in the complaint, not in heec verba, but according to its supposed effect. The answer denied it; and, on the trial, the plaintiff offered in evidence a written contract between the parties, the provisions of which material to this controversy were as follows: The plaintiff, in consideration of being allowed the difference between the rates he might charge for advertising in the various issues of the St. Paul Globe newspaper and the rates thereinafter mentioned, agreed and contracted to take entire charge and control of the real-estate advertising business in the daily and Sunday and weekly Globe, and the defendant agreed, in consideration of such services, to put under his full charge and control all real-estate advertising business of defendant in the daily and Sunday and weekly Globe. The plaintiff agreed to pay the defendant

¹ See Miller v. Ammon, 145 U. S. 421; Hull v. Ruggles, 56 N. Y. 424.

certain specified rates for said real-estate advertising, and the defendant agreed to receive said rates as full payment for all said real-estate advertisements which might appear in the daily, weekly, or Sunday Globe, without regard to the amount plaintiff might charge and receive from advertisers. The contract was to continue for the term of five years, with the option in plaintiff to renew it for another term of five years, or for a shorter time; he to have the right to annul the agreement on giving thirty days' notice of his intention to do so. It was admitted by plaintiff, at the time of making the offer of this contract, that the Sunday Globe referred to in the contract was issued, published, and circulated on Sundays, though set up and printed on Saturdays. The contract was objected to as void upon its face for want of mutuality, and as being against public policy; and it appears to have been argued that it was against public policy because it was an agreement for a violation of the law in regard to Sunday. court below sustained the objection. The plaintiff, of course, failed in his action, and he appeals from an order denying his motion for a new trial. The same objections are made to the contract here as were made below.

The plaintiff contends that, not having pleaded the illegality of the contract, defendant could not assert it on the trial. It is sometimes necessary to plead the facts upon which the illegality of a contract or transaction depends, but it is never necessary to plead the law. When the facts appear, either upon the pleadings or proofs, either party may insist upon the law applicable to such facts. In this case the plaintiff had, under the pleadings, to prove the contract upon which he sued. If it be void on its face, he, not the defendant, showed its illegality.

Though the contract appears in some respects a much more favorable one to the plaintiff than to the defendant, it is not wanting in mutuality of promises and engagements, so as to be without mutual considerations. What the plaintiff is to do appears by implication rather than by express terms. Fairly construed, the contract created the relation of principal and agent between the defendant, as principal, and the plaintiff, as agent, for the management of defendant's real-estate advertising business,—that is, in the charge of procuring advertisements for so

much of the space in the defendant's paper as it devoted to realestate advertising,—and in this business there would arise the duty in the contract. There was, by implication, the promise of plaintiff to manage the business faithfully, and with due regard to the interest of his principal.

The question of the legality of the contract is, therefore, squarely presented; and with a view to that question, and to some propositions that are made in connection with it, it is necessary to say that the contract is entire, so that any taint of illegality in one part affects the whole of it. There is no way of severing it, so we can say that, although its stipulations as to the Sunday Globe may be in violation of law, and therefore void, yet those as to the daily and weekly Globe may be upheld, or so that, although for what was to be done under it prior to January 1, 1886, when the Penal Code went into effect, it was void, it might yet be upheld for all that it provided for after that date. To attempt that would be to attempt making another contract for the parties, - one that the present contract furnishes no reason to suppose they would have made for themselves. of the provisions of the contract must, therefore, stand or fall together.

The plaintiff insists that the contract was not illegal, for it neither was executed on Sunday nor required plaintiff or defendant to do anything on Sunday. It bound defendant to maintain and issue a weekly, a daily, and Sunday Globe for the time specified in it, and it required plaintiff's services in the preparation and procuring, so far as related to the real-estate advertisements, of material for each of those editions of the paper. According to the terms of the contract, the defendant was no more at liberty to discontinue its Sunday edition than to discontinue its daily or weekly edition, or all its editions. The theory of the complaint is that it was bound to continue them all; so that, if to issue, publish, and circulate a newspaper on Sunday was against the law as it existed when this contract was made, then the parties contemplated and stipulated for a violation of the law by each. The law in reference to Sunday, in force at the time when the contract was made, was section 20, c. 100, Gen. St. 1878, as follows:

"No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, except only works of necessity and charity, on the Lord's day, commonly called Sunday; and every person so offending shall be punished by a fine," etc.

A contract which requires or contemplates the doing of an act prohibited by law is absolutely void. No cases of the kind have been more frequently before the courts than contracts which were made on Sunday, or which required or provided that something prohibited by the statute should be done on Sunday; and in no instance has any court failed to declare such a contract void. Unless the issuing and circulating a newspaper on Sunday is, within the meaning of the statute, a work of necessity, it is prohibited by it as much as any other business or work. The newspaper is a necessity of modern life and business, but it does not follow that to issue and circulate it on Sunday is a necessity. There are a great many other kinds of business just as necessary; many, indeed most, kinds of manufactures and mercantile business are indispensable to the present needs of men, but no one would say that, because necessary generally, the prosecution of such business on Sunday is a work of necessity. That carrying on any business on Sunday may be profitable to the persons engaged in it; that it may serve the convenience or the tastes or wishes of the public generally,—is not the test the statute applies. To continue on that day the sale of dry goods or groceries, or the keeping open of markets, saloons, theaters, or places of amusement, might be regarded by many as convenient and desirable, but that would not bring such business within the exception in the statute.

At the time this contract was made, the issuing, publishing, and circulating a newspaper on Sunday was contrary to law; and as the contract provided for that, and as it was indivisible, it was thereby rendered wholly void. The Penal Code went into effect January 1, 1886. Section 229 provides that certain kinds of articles, among them newspapers, may be sold in a quiet and orderly manner on Sunday. Plaintiff contends that the recognition of this contract, and the continuance of business under it for more than a year after the issuance of the Sunday paper became legal by the provisions of the Penal Code, constituted such a ratifi-

cation of the contract as relieved it of any original taint of illegality. There is a difference in the decisions on the question whether a contract, void merely because it was made on Sunday, may be ratified on a secular day, so as to become valid; but there is no conflict of decisions on the proposition that a contract, void because it stipulates for doing what the law prohibits, is incapable of being ratified. That is this case. The contract contemplated the doing what the law then in force prohibited, and for that reason it was void. It is true, the law was so changed after the contract was made, that, from the time of the change, it became, as plaintiff claims, lawful to do those things provided in the contract which were unlawful at the time it was made, and so that, as he claims, a contract like this, made after the change went into effect, would have been valid. But that could not affect the validity of the previous contract, which was void from the beginning. The parties might have made a new contract to commence on or after January 1, 1886; but, because of the illegality in it, they could not at any time ratify this contract from the beginning; and, because it is entire and indivisible, they could do nothing amounting to less than the making of a new contract, which could give vitality to it for the time since January 1, 1886. An entire contract must be ratified, if at all, as an entirety. Order affirmed.

REYNOLDS v. STEVENSON.

4 INDIANA, 619. - 1853.

DAVISON, J. Debt by the plaintiff in error against the defendant on a promissory note. The note is dated the 1st of April, 1850. The defendant pleaded two pleas. 1. Nil debet. 2. That the said note was not made and executed on the day the same bears date; but it was made, executed, and delivered on the 31st of March, 1850, which last-mentioned day was the first day of the week, commonly called Sunday; wherefore the said note was void. Demurrer to the second plea overruled.

A statute in force when this note was given provides that "if any person, etc., shall be found on the first day of the week,

commonly called Sunday, rioting, etc., or at common labor, works of charity and necessity only excepted, such person shall be fined," etc. There is a proviso to the statute, but it has no bearing in this case. R. S. 1843, c. 53, s. 123.

It is admitted that the note in question was made on Sunday. Then the record presents this question: Did the making of it constitute an act of "common labor"? We think the statute intended to prohibit every description of secular business not within the exceptions pointed out by itself. The executing of this note was secular business, and not embraced by the exceptions. This view is sustained by various adjudications made upon statutes the provisions of which are, in effect, the same as ours. Allen v. Deming, 14 N. H. 133; Towle v. Larrabee, 26 Me. 464; Adams v. Hamell, 2 Doug. (Mich.) 73. In Link v. Clemmens (7 Blackf. 479) it was held "that a replevin bond executed on Sunday was void." This authority is decisive of the case before us. The note, no doubt, was made in violation of the statute. Therefore it must be considered a nullity.

Per Curiam. The judgment is affirmed with costs.¹

¹ Accord: Finn v. Donahue, 35 Conn. 216; Clough v. Goggins, 40 Ia. 325; Cranson v. Goss, 107 Mass. 439; Searles v. Reed, 63 Mich. 485; Costello v. Ten Eyck, 86 Mich. 348; Durant v. Rhener, 26 Minn. 362; Troewert v. Decker, 51 Wis. 46. But signing a subscription to liquidate the debt of a church is within the exception of "works of necessity or charity." Bryan v. Watson, 127 Ind. 42.

Contra: "A contract made on Sunday is not void, and to invalidate a transaction under the statute the contract must necessarily require the act to be performed on Sunday. Boynton v. Page, 13 Wend. 425; Watts v. Van Ness, 1 Hill, 76." — Wright, J., in Merritt v. Earle, 29 N. Y. 117. See also Eberle v. Mehrbach, 55 N. Y. 682; Moore v. Murdock, 26 Cal. 514; Bloom v. Richards, 2 Ohio St. 387; Richmond v. Moore, 107 Ill. 429, where the subject is fully discussed.

For distinction sometimes taken between contracts made in the course of "ordinary calling," and those outside that calling, see Allen v. Gardiner, 7 R. I. 22; Hellams v. Abercrombie, 15 S. C. 110. See also Swann v. Swann, 21 Fed. Rep. 299.

On ratification, see Adams v. Gay, 19 Vt. 358; Day v. McAllister, 15 Gray (Mass.), 433.

c. Wagers.

LOVE v. HARVEY.

114 MASSACHUSETTS, 80. - 1873.

Contract. The plaintiff and the defendant made a bet as to the place of burial in Holyhood Cemetery of the body of one Dr. Cahill, the plaintiff betting that it was buried on the left-hand side of the main avenue, and the defendant betting that it was buried on the right-hand side of that avenue. The money was deposited, twenty dollars by each party, in the hands of one James Stack as stakeholder. It was determined that the body was buried on the left-hand side of the avenue, yet the stakeholder delivered to the defendant the plaintiff's twenty dollars, and the defendant, though requested, refused to repay the same to the plaintiff. The declaration contained another count for money had and received by the defendant to the plaintiff's use. The answer was a general denial.

The presiding judge ruled and instructed the jury that courts did not sit to decide wagers; that it did not matter whether the plaintiff was right or not, regarding the situation of the burial-place in question, or whether the defendant received from the stakeholder the same money that was deposited with him by the plaintiff, if the money was paid and received as money of the plaintiff; that if, before the money was paid over to the defendant, the plaintiff forbade payment thereof in the defendant's presence, then the defendant received it without consideration and wrongfully, and was liable in the action for money had and received.

GRAY, C. J. In England and in New York, actions on wagers upon questions in which the parties had no previous interest were frequently sustained, until the legislature interposed and declared all wagers to be void. 1 Chit. Con. (11th Am. ed.) 735-738; 3 Kent. Com. 277, 278. In Scotland, the courts refused to entertain such actions. Bruce v. Ross, 3 Paton, 107, 112; S. C. cited 3 T. R. 697, 705.

In Massachusetts, the English law on this subject has never been adopted, used, or approved, and, although the question has not been directly adjudged, it has long been understood that all wagers are unlawful. Const. Mass. c. 6, art. 6; Amory v. Gilman, 2 Mass. 1, 6; Ball v. Gilbert, 12 Met. 397, 399; Sampson v. Shaw, 101 Mass. 145, 150; Met. Con. 239. There are decisions or opinions to the same effect in each of the New England States. Lewis v. Littlefield, 15 Maine, 233; Perkins v. Eaton, 3 N. H. 152; Hoit v. Hodge, 6 N. H. 104; Collamer v. Day, 2 Vt. 144; West v. Holmes, 26 Vt. 530; Stoddard v. Martin, 1 R. I. 1, 2; Wheeler v. Spencer, 15 Conn. 28, 30. See also Edgell v. M'Laughlin, 6 Whart. 176; Rice v. Gist, 1 Strob. 82.

It is inconsistent alike with the policy of our laws, and with the performance of the duties for which courts of justice are established, that judges and juries should be occupied in answering every frivolous question upon which idle or foolish persons may choose to lay a wager.

The ruling at the trial was therefore correct, and the defendant, having received the money from the stakeholder after notice from the plaintiff not to pay it over, was liable to the plaintiff under the count for money had and received. *McKee* v. *Manice*, 11 Cush. 357.

Exceptions overruled.1

d. Wagers on rise and fall of prices.

MOHR v. MIESEN.

47 MINNESOTA, 228.-1891.

Appeal by defendant from an order of the District Court for Ramsey County, refusing a new trial after a verdict of \$2005.78 for plaintiffs. The jury found specially that "the arrangement between plaintiffs and defendant with reference to the transaction in controversy contemplated the purchase and sale of actual grain for future delivery, and did not contemplate the making of gambling contracts only," and also that "the contracts in evidence were made by and between the plaintiffs and other members of the chamber of commerce, for the purchase and sale of grain actually to be delivered by warehouse receipts, if either party to

¹ See also Bernard v. Taylor, 23 Ore. 416, post, p. 407.

them should require it, and that said contracts were not simply gambling contracts."

VANDERBURGH, J. The plaintiffs sue defendant for money paid and expended for his use in the purchase and sale of grain. The answer sets up that the purchases and sales referred to were not actual or veritable purchases and sales of grain, but were merely colorable, and "were gambling transactions, whereby the plaintiffs in form undertook to buy and sell on the Chicago or Milwaukee boards of trade, ostensibly for future deliveries, but without any intention or expectation on the part of the plaintiffs or defendant that the same would be actually delivered, large quantities of wheat and barley, with the expectation and intention on the part of both plaintiffs and defendant of wagering on the market prices, and that the amounts which defendant would win or lose would be governed by and determined upon the fluctuations in the quotations of the boards of trade." The record shows that the plaintiffs were members of the Milwaukee chamber of commerce, and were brokers negotiating purchases and sales of grain, and accustomed to buy upon margins under the rules of the chamber, and to make advances for customers, and to charge commissions for their services. The defendant during the time of the transactions in controversy was a dealer in wines and liquors in the city of St. Paul. These transactions opened by the receipt by plaintiffs of a telegraphic dispatch from the defendant on November 11, 1886, directing them to "sell ten thousand bushels May wheat." On the following day they accordingly executed the order. February 10th defendant directed the plaintiffs to buy ten thousand bushels May wheat, which order was in like manner executed the same day. - This closed the transaction, so far as the defendant was concerned. The two contracts were adjusted on the basis of the difference in prices at the dates specified, and a statement showing the difference sent to defendant; that is to say, the two contracts were adjusted on the basis of such difference in prices, without waiting for their literal fulfilment, and without any actual delivery of wheat. A large number of other similar purchases and sales of wheat and barley, amounting to hundreds of thousands of bushels, were made by plaintiffs for defendant, and disposed of in like manner, during the year 1887. Some of the "deals" were closed with a profit, others with a loss, to defendant, which was charged up to him by the plaintiffs. During this time the defendant paid out no money for grain whatever, but at plaintiffs' instance, to cover margins for which advances had been made by them on a falling market, he had paid them, between the 10th day of November, 1886, and the 1st day of January, 1888, the sum of \$2462.50, leaving due them, as they claim, the amount demanded in this action. The last transactions, as per statement sent to defendant by plaintiffs, were the reported sale of 10,000 bushels February barley, December 30, 1887, and the purchase of 10,000 bushels February barley, January 3, 1888, difference (loss) reported January 4, 1888, at \$275.

Contracts for the purchase or sale of grain or other commodities to be delivered at a future time are not per se unlawful, if the parties intend in good faith to perform them by the actual delivery of the property according to their terms. Nor are bona fide contracts for the future delivery of goods invalid because at the time of the sale the vendor has not the actual or potential possession of the goods which he has agreed to sell. He may afterwards go into the market and procure the goods which he has agreed to furnish his vendee. Business may be successfully and lawfully conducted in that way; and, where such contracts are intended in good faith to represent actual transactions, they are not unlawful. The law places no unreasonable limitations upon commercial dealings; and it is no legal ground of objection that bona fide contracts for future delivery are entered into for the purpose of making a speculation through an anticipated rise in the price of commodities. But contracts in form for the future delivery of goods not intended to represent actual transactions, - that is, the actual delivery and receipt of the goods, - but merely to pay and receive the difference between the agreed price and the market price at a future day, and upon the risk of the rise or fall in prices, are generally held to be in the nature of wagers on the future price of the commodity, and void by statute or as against public policy. The party dealing in futures in substance bets that the price of a commodity at a future day will be a certain sum more or less than the market prices, which involve elements of risk and uncertainty; and the "stake" is the amount of the "margin" required to cover differences in values, and according to the price of the commodity on a future day the parties to the contract must respectively gain or lose. 22 Am. Law Reg. 613, note.

In Rumsey v. Berry (65 Me. 570) the accepted doctrine is stated as follows:

"A contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law; but such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure."

"The bargain represents not a transfer of property, but a mere stake or wager upon its future price. The difference requires the ownership of only a few hundreds or thousands of dollars, while the capital to complete an actual purchase or sale may be hundreds of thousands or millions. Hence yentures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfil, and thus the apparent business in the particular trade is inflated and unreal, and, like a bubble, needs only to be pricked to disappear, often carrying down the bona fide dealer in its collapse. . . . Such transactions are destructive of good morals and fair dealing and of the best interests of the community." Kirkpatrick v. Bonsall, 72 Pa. St. 155.

It becomes material, therefore, to inquire into the intention of the parties in entering into contracts purporting to be for the future delivery of commodities, and the plaintiffs must be shown to be in pari delicto to defeat a recovery in this action. The language or form of the contract is not conclusive. The real nature of the transaction and the understanding and purpose of the parties may be shown, notwithstanding the contract is fair on its face. Indeed, in view of the extent to which stock and grain gambling is carried on at the exchanges in the commercial centers of the country,—a fact of which the courts are bound to take notice,—time contracts of the character under consideration will be very carefully scrutinized by the courts, and they will go

behind and outside the language of the contract, and look into the facts and circumstances surrounding and connected with it, in order to determine its real character, as in the case of contracts claimed to be void for usury or fraud. In Barnard v. Backhaus, (52 Wis. 593, 600) the court, speaking of contracts for future delivery, went so far as to say that "to justify a court in upholding such an agreement it is not too much to require a party claiming rights under it to make it satisfactorily and affirmatively appear that the contract was made with an actual view to the delivery and receipt of grain, not as an evasion of the statute against gaming, or as a cover for a gambling transaction." The effect of this would be to shift the burden of proof in such cases. The courts of some of the other States have been constrained to adopt the same rule, but upon principle the proposition can hardly be sustained; and the general rule is that the burden of establishing the illegality rests upon the party who asserts it, and such is the great weight of authority in these as well as other cases. is for the legislature to change the rule in this class of cases, if in its wisdom and for reasons of public policy it shall be deemed necessary for the public welfare. Crawford v. Spencer, 92 Mo. 498, and cases.

The testimony of the defendant, which is undisputed, shows or tends to show that he did not intend to make actual bona fide purchases and sales of grain, but intended to "deal in futures" solely, and the manner in which the business was conducted and the several "deals" closed and adjusted by the plaintiffs is consistent with this theory, and tends to support it; and, while this circumstance might not alone be sufficient to establish the fact that plaintiffs, or the third parties with whom they dealt in executing the orders of the defendant, had notice that defendant's object was not to buy and sell grain, but to speculate in the price of grain merely, yet the manner in which the business involving these transactions was conducted was certainly an element to be considered with other circumstances in determining the question of their good faith. Hill v. Johnson, 38 Mo. App. 383; Crawford v. Spencer, 92 Mo. 498. It is not necessary to prove that plaintiffs had express notice of defendant's purpose. The understanding between the parties may be gathered from the facts and

attending circumstances. This is well settled, and upon this point evidence of the defendant's occupation, residence, financial ability; that he never delivered or received or proposed to deliver or receive any grain; that he was not a dealer; and that the orders to purchase were made without reference to or far in excess of his ability to pay for, with other facts of like character, was competent. Cobb v. Prell, 5 McCrary, 85; Carroll v. Holmes, 24 Ill. App. 453, 458, 459; In re Green, 7 Biss. 338, 344; Crawford v. Spencer, supra; Lowry v. Dillman, 59 Wis. 197; Spraque v. Warren (Neb.), 41 N. W. Rep. 1115; Watte v. Wickersham, 27 Neb. 457; Williams v. Tiedemann, 6 Mo. App. 269, 276; Hill v. Johnson, 38 Mo. App. 383, 392. The plaintiffs concede that it was apparent from his correspondence that the defendant's transactions were mostly for speculative purposes. They knew he was in the saloon business, and not in the grain business. jury might find from the facts disclosed by the evidence that the plaintiffs knew that he had not the means to buy grain with, and did not desire or need it, but was operating for the differences only.

The statutes of Wisconsin, where the business was done, were not introduced in evidence. The rights of the parties will therefore be determined by the rules of the common law, as generally accepted and applied in this country. Harvey v. Merrill, 150 Mass. 1. And it is generally held as the common-law doctrine that all wagering contracts are illegal and void as against public policy. Irwin v. Williar, 110 U.S. 499, 510; Harvey v. Merrill, supra. No cause of action arises in favor of a party to an illegal transaction; nor will the law lend its aid to enforce any contract which is in conflict with the terms of a statute, or sound public policy or good morals. In re Green, 7 Biss. 338; Armstrong v. Toler, 11 Wheat. 258; Ruckman v. Bryan, 3 Denio, 340. And there is no reason why a broker or commission merchant should be favored or exempted from consequences resulting to other parties who aid or assist in unlawful transactions. Barnard v. Backhaus, supra. It was through the agency of the plaintiffs that the defendant was attempting to carry on an unlawful busi-They executed his orders, advanced money for margins, and settled the differences. The contracts were all made in their

names, and he was not known in the transactions with third parties, and they were personally responsible to the persons with whom they dealt in making the purchases and sales in question. Under such circumstances it would, of course, be difficult to ascertain whether the latter had notice of the nature of the agreement or understanding existing between the parties to this action; but it was clearly important and material to show that the plaintiffs were cognizant of defendant's illegal purposes, and were engaged in promoting them; and, if they were, the court will not aid them to recover moneys advanced in furtherance of such schemes. The plaintiffs, as brokers or commission merchants, might well decline to aid in transactions of that character; and, if they would do so, a great deal of that kind of gambling would cease, as, in the majority of cases, the ventures could not be made without their financial assistance. As between them and their customers. the same strict rule should be applied as in other cases. Carroll v. Holmes, 24 Ill. App. 453, 460; Hill v. Johnson, 38 Mo. App. 383; Tied. Sales, p. 490, § 302.

The plaintiffs' counsel, however, concedes in his brief in this court that if, by the arrangement between the parties to this suit, they were to undertake gambling transactions, then the intent of third parties was not material. But the defendant's counsel insists that the charge of the court on this subject, including the instructions asked by plaintiffs, would warrant the jury to infer that it was necessary for the defendant to make it appear that the parties with whom plaintiffs dealt were also in pari delicto. Upon this point the charge, taken as a whole, is perhaps not entirely clear, but we think if there was any ambiguity or uncertainty in the charge on the question the defendant should have asked more specific instructions.

It is also assigned as error that the court erred in refusing defendant's second request to charge, which was in substance that, in order to prove notice or knowledge on the part of the plaintiffs of the designs and intentions of the defendant, it is not necessary that defendant should have written or said to any of the plaintiffs that such was his design; but the jury were to determine the understanding of the parties from all the circumstances connected with the transactions between them, and that upon this

question they were "entitled to consider the fact that at the time the plaintiffs sold the barley for the defendant in October, November, and December, 1887, one of the plaintiffs stated that he had no reason to believe that the defendant had the barley at the time of such sales; and the further fact that during a part. at least, of the time of such transactions, the defendant was behind with his margin, and was being pressed by plaintiffs for money to make the margins good; and that plaintiffs immediately after closed these deals, as well as all prior deals, considered the transaction at an end so far as defendant was concerned, and, instead of charging him with the purchase of any wheat, sent him statements charging him with, or crediting him with, as the case might be, the difference between the purchase and the selling price." These instructions were not covered by the general charge, and we think should have been given. Some of the evidence was perhaps of slight importance, but we think, with other facts and circumstances in the case, it was all proper to be considered by the jury in determining the knowledge of the plaintiffs and the real nature of the arrangement between the parties; and without such instructions the jury were in danger of being led to believe, as the court subsequently stated, that there must be an express agreement, and that a mere understanding between the parties was not sufficient.

We think evidence of the general character of transactions in the chamber between other dealers was properly rejected; but for the error above referred to there should be a new trial.

Order reversed.

HARVEY v. MERRILL.

150 MASSACHUSETTS, 1.-1889.

[Reported herein at p. 888.]

e. Wagering policies.

WARNOCK v. DAVIS.

104 UNITED STATES, 775. - 1881.

Action to recover a balance on a life insurance policy issued to plaintiff's intestate and by him assigned to defendants to whom the policy was paid. Judgment for defendants. Plaintiff brings error.

The intestate entered into an agreement with defendants that he would take out a policy for \$5000 and assign nine-tenths of the same to defendants, one-tenth to be payable to his wife; that he would pay defendants \$6 in hand and annual dues amounting to \$2.50. They on their part agreed to keep up the annual premiums on the policy, and on the death of intestate collect and pay over to his widow one-tenth of the policy. In pursuance of this agreement a policy was taken out by the intestate and assigned to defendants on the terms stipulated. On the death of intestate the defendants collected the policy and paid over to the widow one-tenth of the amount, less certain sums due under the agreement. Plaintiff, as administrator, brings an action for the balance of the money collected under the policy.

Mr. Justice Field. As seen from the statement of the case, the evidence before the court was not conflicting, and it was only necessary to meet the general allegations of the first defense. All the facts established by it are admitted in the other defenses. The court could not have ruled in favor of the defendants without holding that the agreement between the deceased and the Scioto Trust Association was valid, and that the assignment transferred to it the right to nine-tenths of the money collected on the policy. For alleged error in these particulars the plaintiff asks a reversal of the judgment.

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have

taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.

It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. natural affection in cases of this kind is considered as more powerful — as operating more efficaciously — to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to They are, therefore, independently create a desire for the event. of any statute on the subject, condemned, as being against public policy.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be

transferred so as to entitle the assignee to retain the whole insurance money.

The question here presented has arisen, under somewhat different circumstances, in several of the state courts; and there is a conflict in their decisions. In Franklin Life Insurance Company v. Hazzard, which arose in Indiana, the policy of insurance, which was for \$3000, contained the usual provision that if the premiums were not paid at the times specified the policy would be forfeited. The second premium was not paid, and the assured, declaring that he had concluded not to keep up the policy, sold it for twenty dollars to one having no insurable interest, who took an assignment of it with the consent of the secretary of the insurance company. The assignee subsequently settled with the company for the unpaid premium. In a suit upon the policy, the Supreme Court of the State held that the assignment was void, stating that all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. "In either case," said the court, "the holder of such policy is interested in the death rather than the life of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life." 41 Ind. 116. court referred with approval to a decision of the same purport by the Supreme Court of Massachusetts, in Stevens v. Warren, 101 Mass. 564. There the question presented was whether the assignment of a policy by the assured in his lifetime, without the assent of the insurance company, conveyed any right in law or equity to the proceeds when due. The court was unanimously of opinion that it did not; holding that it was contrary not only to the terms of the contract, but contrary to the general policy of the law respecting insurance, in that it might lead to gambling or speculative contracts upon the chances of human life. court also referred to provisions sometimes inserted in a policy expressing that it is for the benefit of another, or is payable to another than the representatives of the assured, and, after remarking that the contract in such a case might be sustained, said, "that the same would probably be held in the case of an assignment with the assent of the assurers. But if the assignee has no interest in the life of the subject which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the parties, of the person who should be entitled to receive the proceeds when due, instead of the personal representatives of the deceased. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained."

Although the agreement between the Trust Association and the assured was invalid as far as it provided for an absolute transfer of nine-tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was, also, lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned.

The decisions of the New York Court of Appeals are, we are aware, opposed to this view. They hold that a valid policy of insurance effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum, payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. St. John v. American Mutual Life Insurance Company, 13 N. Y. 31; Valton v. National Fund Life Assurance Company, 20 Id. 32. In the opinion in the first case the court cite Ashley v. Ashley (3 Simons, 149) in support of its conclusions; and it

must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other; — so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

In this conclusion we are supported by the decision in Cammack v. Lewis, 15 Wall. 643. There a policy of life insurance for \$3000, procured by a debtor at the suggestion of a creditor to whom he owed \$70, was assigned to the latter to secure the debt. upon his promise to pay the premiums, and, in case of the death of the assured, one-third of the proceeds to his widow. the death of the assured, the assignee collected the money from the insurance company and paid to the widow \$950 as her proportion after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance of the money collected, and recovered judgment. case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion.

The judgment of the court below will, therefore, be reversed, and the cause remanded with direction to enter a judgment for the plaintiff for the amount collected from the insurance company, with interest, after deducting the sum already paid to the widow, and the several sums advanced by the defendants; and it is

So ordered.1

(ii.) Contracts illegal at common law.

a. Agreements to commit an indictable offense or civil wrong.

MATERNE v. HORWITZ.

101 NEW YORK, 469.-1886.

Action for damages for refusal to accept goods tendered under contract of sale. Complaint dismissed. Plaintiff appeal from judgment of the General Term of New York City Superior Court affirming judgment. (Reported 18 J. & S. 41, where the facts appear.)

Plaintiffs sold defendants 400 cases of "domestic sardines," the boxes to have "fancy labels" on them. Domestic sardines were fish packed in Maine, and fancy labels were decorated labels containing a statement in substance that the sardines were packed in France in olive oil by persons named on the label. Imported sardines were worth about 50 per cent more than domestic. The goods tendered had on them labels as described. Plaintiffs and defendants were wholesale dealers.

MILLER, J. It must be assumed, we think, that the defendants knew when the agreement was made that they intended to purchase sardines of the kind that were tendered to them, and that the plaintiffs understood that the defendants knew it. inferable that the defendants entered into the agreement, to the knowledge of the plaintiffs, for the purpose of selling the goods to others in the condition in which they were when delivered. is also evident that the labels were used to deceive the consumers and not the contractors, and to obtain higher prices for the The plaintiffs procured and furnished the deceptive sardines. labels, after binding themselves by contract to do so, and this was done for an unlawful purpose, and with a view of furnishing goods for the market in a condition calculated to deceive the consumers who might purchase them. It is, therefore, apparent that it was part of the contract that an unlawful object was intended, of which both parties were cognizant, and that it was designed by them, under the contract, to commit a fraud and thus promote an illegal purpose by deceiving other parties. In such a case the courts will not aid either party in carrying out a fraudulent purpose.

To carry out this contract would be contrary to public policy, and in such a case, as we have seen, the court will not aid either party.

Under the Penal Code (§ 438), it is made a misdemeanor to sell or offer for sale any package falsely marked, labeled, etc., as to the place where the goods were manufactured, or the quality or grade, etc. The contract in question would seem to be covered by this provision of the Code, but as the Penal Code did not go into effect until May 1, 1882, and this contract was made June 30, 1881, the section cited has, we think, no bearing on the question presented.

The case was properly disposed of upon the ground first stated, which is fully considered and elaborated in the opinion of the General Term, Sedgwick, J., in which we concur.

The judgment should be affirmed. All concur.

Judgment affirmed.1

1 Where a note was given for the sale of "prolific oats" at fifteen dollars a bushel, the payee agreeing to sell eighty bushels for the maker the next year at fifteen dollars a bushel, the court said: "That this contract is void as being against public policy, we have no doubt. Any contract that binds the maker to do something opposed to the public policy of the State or nation, or that conflicts with the wants, interests or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, is void. Any contract which has for its object the practice of deception upon the public, or upon any party in interest as to the ownership of property, the nature of a transaction, the responsibility assumed by an obligation, or which is made in order to consummate a fraud upon the people or upon third persons, is void. Greenh. Pub. Pol. 136, 152. This contract is so out of the usual course of dealings as to awaken suspicion of its fairness. Ordinarily, contracts are made upon the basis of what is believed to be actual values, but this is confessedly upon the basis of most extravagant and unreal values. To carry out this contract eighty bushels of grain had to be sold to some person on or before September 1, 1888, for more than thirty times their value. This could only be done by grossly deceiving the purchaser as to their value, or repeating the scheme upon which this contract was made, or one similar. That such a scheme could not be repeated year after year is evident, so that in the end some person must be deceived into paying many times the value of the oats. If it was not intended upon the part of the company to carry out the contract, then the fraud was consummated the sooner. View the transaction as you may,

- b. Agreements to do that which it is the policy of the law to prevent.
- (a) Agreements which injure the state in its relations with other states.

UNITED STATES v. GROSSMAYER.

9 WALLACE (U. S.), 72.-1869.

[Reported herein at p. 215.]

GRAVES v. JOHNSON.

156 MASSACHUSETTS, 211.-1892.

[Reported herein at p. 891.]

(β) Agreements which tend to injure the public service.

TRIST v. CHILD.

21 WALLACE (U. S.), 441.—1874.

Bill to enjoin defendant from withdrawing the sum of \$14,559 from the United States Treasury, and for a decree commanding him to pay complainant \$5000, and for general relief. Defense, illegality. Decree for complainant. Defendant appeals.

Defendant, having a claim against the United States for services, made an agreement with complainant's father (to whose rights as partner and personal representative complainant succeeded) that he should take charge of the claim and prosecute it

and it discloses a cunningly-devised plan to cheat and defraud. 'Whenever any contract conflicts with the morals of the time and contravenes any established interests of society, it is void as being against public policy.' Story, Confl. Laws, sec. 546. Surely a contract that cannot he performed without deception and fraud conflicts with the morals of the time, and contravenes the established interest of society. There was no error in instructing the jury that this contract is fraudulent and void as between the original parties to it. In this connection, see McNamara v. Gargett, 68 Mich. 454; 36 N. W. Rep. 218, wherein the Supreme Court of Michigan held a similar contract void as being against public policy. True, in that case the contract is said to be a gambling contract, but it is declared to he against public policy on other grounds." — Given, J., in Merrill v. Packer, 80 Iowa, 542.

before Congress, and receive as compensation 25 per cent of whatever sum Congress might appropriate. The father, and after his death, the complainant, prosecuted the claim with the result that Congress appropriated the sum of \$14,559 to pay it. Defendant refused to pay the 25 per cent stipulated and complainant filed this bill in the Supreme Court of the District of Columbia. From the evidence it appeared that personal solicitations were used to carry the bill, but there was no evidence that bribes were offered or contemplated.

Mr. Justice Swayne. The court below decreed to the appellee the amount of his claim, and enjoined Trist from receiving from the treasury "any of the money appropriated to him" by Congress, until he should have paid the demand of the appellee.

This decree, as regards that portion of the fund not claimed by the appellee, is an anomaly. Why the claim should affect that part of the fund to which it had no relation, is not easy to be imagined. This feature of the decree was doubtless the result of oversight and inadvertence. The bill proceeds upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant upon the fund appropriated. We shall examine the latter ground first. Was there, in any view of the case, a lien?

It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. Yeates v. Groves, 1 Vesey, Jr. 280; Lett v. Morris, 4 Simons, 607; Bradley v. Root, 5 Paige, 632; 2 Story's Equity, § 1047. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. Field v. The Mayor, 2 Selden, 179. But a mere agreement to pay out of such fund is not sufficient. more is necessary. There must be an appropriation of the fund pro tanto, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the Wright v. Ellison, 1 Wallace, 16; Hoyt v. Story, 3 Barbour's Supreme Court, 264; Malcolm v. Scott, 3 Hare, 39; Rogers v. Hosack, 18 Wendell, 319.

Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in nowise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. Wright v. Ellison, 1 Wallace, 16. If there was no lien, there was no jurisdiction in equity.

There is another consideration fatally adverse to the claim of a lien. The first section of the act of Congress of February 26, 1853, declares that all transfers of any part of any claim against the United States, "or of any interest therein, whether absolute or conditional, shall be absolutely null and void, unless executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant therefor." That the claim set up in the bill to a specific part of the money appropriated is within this statute is too clear to admit of doubt. It would be a waste of time to discuss the subject.

But there is an objection of still greater gravity to the appellee's case.

Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of Congress, from whom he had received favorable assurances, he proceeds: "Please write to your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." *Institutes of Justinian*, lib. 3, tit. 19, par. 24. In our jurisprudence a contract may be illegal and void because it is

contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said (Jones v. Randall, 1 Cowper, 39): "Many contracts which are not against morality, are still void as being against the maxims of sound policy."

It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are:

An agreement — to pay for supporting for election a candidate for sheriff, Swayze v. Hull, 3 Halsted, 54; to pay for resigning a public position to make room for another, Eddy v. Capron, 4 Rhode Island, 395; Parsons v. Thompson, 1 H. Blackstone, 322; to pay for not bidding at a sheriff's sale of real property, Jones v. Caswell, 3 Johnson's Cases, 29; to pay for not bidding for articles to be sold by the government at auction, Doolin v. Ward, 6 Johnson, 194; to pay for not bidding for a contract to carry the mail on a specified route, Gulick v. Bailey, 5 Halsted, 87; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself, Gray v. Hook, 4 Comstock, 449; to pay for procuring a contract from the government, Tool Company v. Norris, 2 Wallace, 45; to pay for procuring signatures to a petition to the governor for a pardon, Hatzfield v. Gulden, 7 Watts, 152; to sell land to a particular person when the surrogate's order to sell should have been obtained, Overseers of Bridgewater v. Overseers of Brookfield, 3 Cowen, 299; to pay for suppressing evidence and compounding a felony, Collins v. Blantern, 2 Wilson, 347; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution, Boynton v. Hubbard, 7 Massachusetts, 112; to pay for promoting a marriage, Scribblehill v. Brett, 4 Brown's Parliamentary Cases, 144; Arundel v. Trevillian, 1 Chancery Reports, 87; to influence the disposition of property by will in a particular way, Debenham v. Ox, 1 Vesey, Sr. 276; see also Addison on Contracts, 91; 1 Story's Equity, ch. 7; Collins v. Blantern, 1 Smith's Leading Cases, 676, American note.

The question now before us has been decided in four American They were all ably considered, and in all of them the contract was held to be against public policy, and void. Clippinger v. Hepbaugh, 5 Watts & Sergeant, 315; Harris v. Roof's Executor, 10 Barbour's Supreme Court, 489; Rose & Hawley v. Truax, 21 Id. 361; Marshall v. Baltimore and Ohio Railroad Company, 16 Howard, 314. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. 1 Montesquieu, Spirit of Laws, 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in

such cases is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the springhead and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at

every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, potior conditio defendentis. Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

Decree reversed, and the case remanded, with directions to

Dismiss the bill.

SOUTHARD v. BOYD.

51 NEW YORK, 177. - 1872.

Action to recover commissions earned by plaintiffs as ship brokers in chartering defendant's vessel to the government. Judgment for plaintiffs reversed at General Term. Plaintiffs appeal.

EARL, C. . . . The further claim is made that the contract with the plaintiffs was for an illegal service, in that they charged a commission for claiming to have influence with a government agent to accept a vessel already offered, but not yet accepted.

It is true that one of the plaintiffs was a son, and that another was a son-in-law of one of the government agents, whose business it was to select the vessels for the government, and the plaintiffs probably had facilities for chartering vessels which others did not have. But the plaintiffs did not contract to do an illegal service. They did not agree to use any corrupt means to procure the charter. The fact that the plaintiffs had intimate relations with the government agents, and could probably therefore influence their action much more readily than others, did not forbid their employment. Lyon v. Milchell, 36 N. Y. 235.

I am unable to see, therefore, upon what ground the contract of the defendant with the plaintiffs can be considered as illegal.

The order of the general term should be reversed and judgment upon the verdict affirmed, with costs. All concur.

Order reversed and judgment accordingly.1

1 "There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements."—Mr. Justice Field, in Tool Co. v. Norris, 2 Wall. (U. S.) 45, 55. Followed in Meguire v. Corwine, 101 U. S. 108 (contract for appointment to public office); Oscanyan v. Arms Cox (contract of resident consult o influence purchasing agent of home government). See criticism on the case in Lyon v. Mitchell, 36 N. Y. 235.

As to agreements for influencing corporate or other fiduciary action, see Woodstock Iron Co. v. Richmond &c. Co. 129 U. S. 643.

As to the assignment of unearned salaries of public officers, see Bowery Nat. Bank v. Wilson, 122 N. Y. 478.

As to agreements to quiet competition for public contracts, see *Brooks* v. *Cooper*, 50 N. J. Eq. 761; *Boyle* v. *Adams*, 50 Minn. 255.

- (γ) Agreements which tend to pervert the course of justice.
 - (1.) Stifling criminal proceedings.

PARTRIDGE v. HOOD.

120 MASSACHUSETTS, 403. - 1876.

Contract. The answer averred that the consideration of the contract was an agreement on the part of the plaintiff to stop a criminal prosecution against Edward K. Hood, the defendant's son. The court ruled that the agreement was illegal and directed judgment for defendant. Plaintiff alleged exceptions.

GRAY, C. J. The reason that a private agreement, made in consideration of the suppression of a prosecution for crime, is illegal, is that it tends to benefit an individual at the expense of defeating the course of public justice. The doctrine has never been doubted as applied to felonies, and the English authorities before our Revolution extended it to all crimes. 2 West Symb. Compromise & Arbitrament, § 33; Horton v. Benson, 1 Freem. 204; Bac. Ab. Arbitrament & Award, A; Johnson v. Ogilby, 3 P. Wms, 277, and especially the register's book cited by Mr. Cox in a note to page 279; Collins v. Blantern, 2 Wils. 341; 4 Bl. Com. 363, 364. An appeal of mayhem could be barred by arbitrament. or accord and satisfaction, or release of all personal actions, because it was the suit of the appellant and not of the Crown, and subjected the appellee to damages only, like an action of trespass. Blake's Case, 6 Rep. 43 b, 44 c; 2 Hawk. c. 23, §§ 24, 25.

Some confusion was introduced into the English law upon this subject by the rulings of Lord Kenyon: Kyd on Awards (Am. ed.), 64-68; Drage v. Ibberson, 2 Esp. 643; Fallowes v. Taylor, Peake Ad. Cas. 155; S. C. 7 T. R. 475; and by Mr. Justice Le Blanc's suggestion of a distinction between a prosecution for public misdemeanor and one for a private injury to the prosecutor. Edgeombe v. Rodd, 5 East, 294, 303; S. C. 1 Smith, 515, 520. This confusion was not wholly removed by the opinions of Lord Ellenborough in Edgeombe v. Rodd, 5 East, 294, 302; in Wallace v. Hardacre, 1 Camp. 45, 46; in Pool v. Bousfield, 1 Camp. 55, and in Beeley v. Wingfield, 11 East, 46, 48; of Chief

Justice Gibbs in Baker v. Townshend, 1 Moore, 120, 124; S. C. 7 Taunt. 422, 426; or of Lord Denman in Keir v. Leeman, 6 Q. B. 308, 321.

But in the very able judgment of the Exchequer Chamber in Keir v. Leeman (9 Q. B. 371, 395), Chief Justice Tindal, after reviewing the previous cases, summed up the matter thus:

"Indeed it is very remarkable what very little authority there is to be found, rather consisting of dicta than decisions, for the principle that any compromise of a misdemeanor, or indeed of any public offense, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were res integra, we should have no doubt on this point. We have no doubt that, in all offenses which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so, but we are not disposed to extend this any further."

In Fisher v. Apollinaris Co. (L. R. 10 Ch. 297) the plaintiff, pursuant to an agreement of the defendants to abandon a prosecution against him under St. 25 & 26 Vict. c. 88, for a violation of their trade-mark, gave them a letter of apology, with authority to make use of it as they might think necessary, and, after they had published it by advertisement for two months, filed a bill in equity to restrain them from continuing the publication, which was dismissed by the lords justices. The principal grounds of the decision appear to have been that the defendants had done nothing that the plaintiff had not authorized them to do; and that, even if the publication affected the plaintiff's reputation, a court of chancery had no jurisdiction to restrain it. See Prudential Assurance Co. v. Knott, L. R. 10 Ch. 142; Boston Diatite Co. v. Florence Manufacturing Co., 114 Mass. 69. It was indeed observed that "it was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway." L. R. 10 Ch. 302. But this observation was not necessary to the decision; and in The Queen v. Blakemore (14 Q. B. 544) an agreement for the compromise of an indictment for

not repairing a highway was held illegal and void. All the other recent English authorities support the judgment of Chief Justice Tindal, above quoted. The Queen v. Hardey, 14 Q. B. 529, 541; Clubb v. Hutson, 18 C. B. (N. S.) 414; Williams v. Bayley, L. R. 1 H. L. 200, 213, 320.

In Jones v. Rice (18 Pick. 440, 442), Mr. Justice Putnam delivering the opinion of this court, after alluding to the English cases in the time of Lord Kenyon, relied on to "sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful," said:

"We do not think that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. The power to stop prosecutions is vested in the law officers of the Commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offense, he might extort for his own use money which properly should be levied as a fine upon the criminal party for the use of the Commonwealth."

It is true that the prosecution in Jones v. Rice was for a riot as well as for an assault. But the language and the reasoning of the opinion extend to the compounding of any offense whatever. Any act which is made punishable by law as a crime is an offense against the public, and, especially in this country, where all prosecutions are subject to the control of official prosecutors, and not of the individuals immediately injured, cannot lawfully be made the subject of private compromise, except so far as expressly authorized by statute. And this view is supported by the great weight of American authority. Hinds v. Chamberlin, 6 N. H. 225; Shaw v. Spooner, 9 N. H. 197; Shaw v. Reed, 30 Maine, 105; Bowen v. Buck, 28 Vt. 308; People v. Bishop, 5 Wend. 111; Noble v. Peebles, 13 S. & R. 319, 322; Maurer v. Mitchell, 9 W. & S. 69, 71; Cameron v. M'Farland, 2 Car. Law Rep. 415; Corley v. Williams, 1 Bailey, 588; Vincent v. Groom, 1 Yerger, 430; Met. Con. 226, 227; 1 Story Eq. Jur. § 294.

The legislature of the commonwealth has defined the cases and circumstances in which the compromise of a prosecution shall be allowed. By a provision first introduced in the Revised Statutes, when a person is committed or indicted for an assault and battery or other misdemeanor for which the party injured may have a remedy by civil action (except when committed by or upon an officer of justice, or riotously, or with intent to commit a felony), if the party injured appears before the magistrate or court and acknowledges satisfaction for the injury sustained, a stay of proceedings may be ordered. Rev. Sts. c. 135, § 25; c. 136, § 27; Gen. Sts. c. 170, § 33; c. 171, § 28. Such an acknowledgment of satisfaction does not entitle the defendant to be discharged, but leaves it to the discretion of the magistrate or court whether a stay of proceedings is consistent with the interests of public justice. Commonwealth v. Dowdican's Bail, 115 Mass. 133. See also State v. Hunter, 14 La. Ann. 71.

In the case at bar, it being found as a fact that the agreement sued on was entered into by the defendant for the purpose of compounding a complaint against her son for a misdemeanor, and it not appearing that satisfaction has ever been acknowledged in or approved by the court in which the prosecution was pending, judgment was rightly ordered for the defendant.

Exceptions overruled.1

(2.) Agreements to arbitrate.

HAMILTON v. LIVERPOOL &c. INS. CO.

136 UNITED STATES, 242.—1889.

Action on an insurance policy containing this stipulation:

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

¹ See also *Goodrich* v. *Tenney*, 144 Ill. 422 (agreement to procure testimony); *Bowman* v. *Phillips*, 41 Kans. 364 (agreement to defend for future violations of law).

The manner provided for fixing the amount of loss in case of dispute was by reference to arbitrators selected by the parties. The court directed a verdict for the defendant. Plaintiff brings error.

MR. JUSTICE GRAY. The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action.

Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. Scott v. Avery, 5 H. L. Cas. 811; Viney v. Bignold, 20 Q. B. D. 172; Delaware & Hudson Canal v. Pennsylvania Coal Co., 50 N. Y. 250; Reed v. Washington Ins. Co., 138 Mass. 572, 576; Wolff v. Liverpool & London & Globe Ins. Co., 21 Vroom, 453; Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 114. The case comes within the general rule long ago laid down by this court: "Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or

accident he is unable to do so." United States v. Robeson, 9 Pet. 319, 327. See also Martinsburg & Potomac Railroad v. March, 114 U. S. 549.

Upon the evidence in this case, the question whether the defendant had duly requested, and the plaintiff had unreasonably refused, to submit to such an appraisal and award as the policy called for, did not depend in any degree (as in *Uhrig* v. *Williamsburg Ins. Co.*, 101 N. Y. 362, cited for the plaintiff) on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law, to be decided by the court. *Turner* v. *Yates*, 16 How. 14, 23; *Bliven* v. *New England Screw Co.*, 23 How. 420, 433; *Smith* v. *Faulkner*, 12 Gray, 251.

That correspondence clearly shows that the defendant explicitly and repeatedly in writing requested that the amount of the loss or damage should be submitted to appraisers in accordance with the terms of the policy; and that the plaintiff as often peremptorily refused to do this, unless the defendant would consent, in advance, to define the legal powers and duties of the appraisers (which the defendant was under no obligation to do), and that the plaintiff throughout, against the constant protest of the defendant, asserted, and at last exercised, a right to sell the property before the completion of an award according to the policy, thereby depriving the defendant of the right, reserved to it by the policy, of taking the property at its appraised value, when ascertained in accordance with the conditions of the policy.

The court therefore rightly instructed the jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy, and that the plaintiff, therefore, could not maintain this action.

If the plaintiff had joined in the appointment of appraisers, and they had acted unlawfully, or had not acted at all, a different question would have been presented.

Judgment affirmed.1

¹ In Hamilton v. Home Ins. Co. (137 U. S. 370), the provisions were (1) for an appraisal by disinterested parties, and (2) in case of differences as to loss after proof, the submission of the dispute to arbitrators "whose award in writing shall be binding on the parties as to the amount of such

(δ) Agreements which tend to abuse of legal process: champerty and maintenance.

ACKERT v. BARKER.

131 MASSACHUSETTS, 436. - 1881.

Action against an attorney for money had and received, being the sums obtained by him on suits against two insurance companies. The answer set up "that the plaintiff agreed, in consideration of the defendant acting for him in the premises, that said defendant should, out of any and all moneys received by him from said insurance companies, retain one-half of the amount received after payment of proper costs and charges." The trial court charged that if the jury found that there was an agreement by which defendant was to retain one-half the sum collected as com-

loss or damage, but shall not decide the liability of the company under this policy." In the opinion by Mr. Justice Gray, it is said: "A provision in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such award, then, as adjudged in Hamilton v. Liverpool, London & Globe Ins. Co., above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent, and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. Roper v. Lendon, 1 El. & El. 825; Collins v. Locke, 4 App. Cas. 674; Dawson v. Fitzgerald, 1 Ex. D. 257; Reed v. Washington Ins. Co., 138 Mass. 572; Seward v. Rochester, 109 N. Y. 164; Birmingham Ins. Co. v. Pulver, 126 Ill. 329, 338; Crossley v. Connecticut Ins. Co., 27 Fed. Rep. 30. The rule of law upon the subject was well stated in Dawson v. Fitzgerald by Sir George Jessel, Master of the Rolls, who said: 'There are two cases where such a plea as the present is successful: first, where the action can only be brought for the sum named by the arbitrators; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant, 'to bring an action for not referring,' or (under a modern English statute) 'to stay the action till there has been an arbitration.' 1 Ex. D. 260." See post, Absolute promises and concurrent conditions, Pt. V., Ch. III., § 2 (v.), a.

pensation for his services, such agreement was unlawful. Verdict for plaintiff. Defendant alleged exceptions.

GRAY, C. J. The defendant's answer and bill of exceptions, fairly construed, show that the agreement set up by the defendant was an agreement by which, in consideration that an attorney should prosecute suits in behalf of his client for certain sums of money, in which he had himself no previous interest, it was agreed that he should keep one-half of the amount recovered in case of success, and should receive nothing for his services in case of failure.

By the law of England from ancient times to the present day, such an agreement is unlawful and void, for champerty and maintenance, as contrary to public justice and professional duty, and tending to speculation and fraud, and cannot be upheld, either at common law or in equity. 2 Rol. Ab. 114; Lord Coke, 2 Inst. 208, 564. Hobart, C. J., Box v. Barnaby, Hob. 117 a; Lord Nottingham, Skapholme v. Hart, Finch, 477; S. C. 1 Eq. Cas. Ab. 86, pl. 1; Sir William Grant, M. R., Stevens v. Bagwell, 15 Ves. 139; Tindal, C. J., Stanley v. Jones, 7 Bing. 369, 377; S. C. 5 Moore & Payne, 193, 206; Coleridge, J., In re Masters, 1 Har. & Wol. 348; Shadwell, V. C., Strange v. Brennan, 15 Sim. 346; Lord Cottenham, S. C. on appeal, 2 Coop. Temp. Cottenham, 1; Erle, C. J., Grell v. Levy, 16 C. B. (N. S.) 73; Sir George Jessel, M. R., In re Attorneys & Solicitors Act, 1 Ch. D. 573.

It is equally illegal by the settled law of this Commonwealth. Thurston v. Percival, 1 Pick. 415; Lathrop v. Amherst Bank, 9 Met. 489; Swett v. Poor, 11 Mass. 549; Allen v. Hawks, 13 Pick. 79, 83; Call v. Calef, 13 Met. 362; Rindge v. Coleraine, 11 Gray, 157, 162; 1 Dane Ab. 296; 6 Dane Ab. 740, 741. In Lathrop v. Amherst Bank, the fact that the agreement did not require the attorney to carry on the suit at his own expense was adjudged to be immaterial. 9 Met. 492. In Scott v. Harmon (109 Mass. 237) and in Tapley v. Coffin (12 Gray, 420), cited for the defendant, the attorney had not agreed to look for his compensation to that alone which might be recovered, and thus to make his pay depend upon his success.

The law of Massachusetts being clear, there would be no pro-

priety in referring to the conflicting decisions in other parts of the country. If it is thought desirable to subordinate the rules of professional conduct to mercantile usages, a change of our law in this regard must be sought from the legislature and not from the courts.

The defendant, by virtue of his employment by the plaintiff, and of his professional duty, was bound to prosecute the claims intrusted to him for collection, and holds the amount recovered as money had and received to the plaintiff's use. The agreement set up by the defendant, that he should keep one-half of that amount, being illegal and void, he is accountable to the plaintiff for the whole amount, deducting what the jury have allowed him for his costs. In re Masters, and Grell v. Levy, above cited; Pince v. Beattie, 32 L. J. (N. S.) Ch. 734.

Of Best v. Strong (2 Wend. 319), on which the defendant relies as showing that, assuming this agreement to be illegal, the plaintiff cannot maintain this action, it is enough to say that there the money was voluntarily paid to the defendant, with the plaintiff's assent, after the settlement of the suit by which it was recovered; and it is unnecessary to consider whether, upon the facts before the court, the case was well decided.

Exceptions overruled.1

1 "The grounds upon which contracts were held voidable for champerty or maintenance, as against the policy of the law, were that there might be combinations of powerful individuals to oppress others which might even influence or overawe the court, and that they tended to the promotion and enforcement of unfounded claims, to disturb the public repose, to promote litigation, and to breed strife and quarrels among neighbors. With the progress of society these reasons have everywhere lost much of their force, and the whole doctrine on this subject has been rejected in several States of the Union as antiquated and incongruous in the existing state of society, notably in New Jersey, Texas, California, and Mississippi. Without desiring to modify or in any way recede from the doctrine on this subject, as it has heretofore been held in Massachusetts, we see no reason for its further extension. Neither the definition of champerty nor the reasons why it was held to be an offense have any proper application to a proceeding such as that by which the defendant, under his contract with the plaintiff, sought to enforce his claim against the government of the United States. There was no suit to be brought, nor any defendant in the proposed proceeding, in the same sense that there is in a contested cause at law or in equity." - Devens, J., in Manning v. Sprague, 148 Mass. 18, 20.

"The first objection of the plaintiffs in error is that the contract set up

(ϵ) Agreements which are contrary to good morals.

BOIGNERES v. BOULON.

54 CALIFORNIA, 146.-1880.

Appeal from judgment of nonsuit, and order denying new trial.

Department No. 1, by the Court (from the Bench):

The only evidence in respect to the alleged promise of marriage is the testimony of the plaintiff herself. She declares—such is the effect of her language—that the only consideration for the promise was that she should continue the immoral and illegal relation toward defendant as his mistress, which she had held previous to the promise. This is only saying that he promised to marry her at some date not mentioned, if she would continue to surrender her person to him as she had done in the past.

It has been held, and we think correctly, that such promise or surrender on the part of the woman is not sufficient consideration for a promise of marriage, because immoral, illegal, and against public policy. On the authority of *Hanks* v. *Naglee*, November Term, 1879, the judgment must be affirmed. So ordered.

in declaration is one for a contingent compensation. Such a defense in some jurisdictions would be a good one; but a settled rule of this court is the other way. Reported cases to that effect show that the proposition is one beyond legitimate controversy. Wylie v. Coxe, 15 How. 415; Wright v. Tebbitts, 91 U. S. 252."—Mr. Justice Clifford, in Stanton v. Embrey, 93 U. S. 548, 556.

"This, however, does not remove the suspicion which naturally attaches to such contracts, and where it can be shown that they are obtained from the suitor by any undue influence of the attorney over the client, or by any fraud or imposition, or that the compensation is clearly excessive, so as to amount to extortion, the court will in a proper case protect the party aggrieved."—Mr. Justice Miller, in Taylor v. Bemiss, 110 U. S. 42, 45, 46.

See also Fowler v. Callan, 102 N. Y. 395; Reece v. Kyle, 49 Ohio St. 475.

1 Accord: Brown v. Tuttle, 80 Me. 162.

KURTZ v. FRANK.

76 INDIANA, 594. - 1881.

Action by the appellee against the appellant for a breach of promise of marriage. Verdict for plaintiff. Defendant appeals from an order denying motion for new trial.

Woods, J. . . . The plaintiff testified that the defendant promised to marry her in September or October (1878); that he said he would marry her in the fall if they could agree and get along, and be true to each other; but, if she became pregnant from their intercourse, he would marry her immediately. She did become pregnant, about the middle of July, 1878, and informed the defendant of the fact as soon as aware of it. Upon this evidence, it is insisted that the agreement to marry immediately in case of the plaintiff's pregnancy, is void, because immoral, and that, aside from this part of the agreement, the defendant had until the first of December within which to fulfill his engagement; and, consequently, that the suit, begun as it was before that date, was prematurely brought.

It does not appear that the illicit intercourse entered into the consideration of the marriage contract, but the appellant, having agreed to marry the appellee at a time then in the future, obtained the intercourse upon an assurance that, if pregnancy resulted, the contract already made should be performed at once. This did not supersede the original agreement, but fixed the time for its performance. Clark v. Pendleton, 20 Conn. 495.

We are not prepared to lend judicial sanction and protection to the seducer by declaring that he may escape the obligation of his contract, so made, on the plea that it is immoral. But if this were otherwise, and if, by its terms, the contract was not to have been performed until at a time subsequent to the commencement of the suit, yet if, before the suit was brought, the appellant had renounced the contract, and declared his purpose not to keep it, that constituted a breach, for which the appellee had an immediate right of action. Burtis v. Thompson, 42 N. Y. 246; Holloway v. Griffith, 32 Iowa, 409; S. C. 7 Am. Rep. 208, n;

Frost v. Knight, L. R. 7 Exch. 111; S. C. 1 Moak's Eng. Rep. 218.

We cannot say that the award of damages was excessive.

Judgment affirmed, with costs.

(ζ) Agreements which affect the freedom or security of marriage.

STERLING v. SINNICKSON.

2 SOUTHARD (5 N. J. L.), 756.—1820.

Declaration in debt on a sealed bill, which was as follows:

"I, Seneca Sinnickson, am hereby bound to Benjamin Sterling, for the sum of one thousand dollars, provided he is not lawfully married in the course of six months from the date hereof. Witness my hand and seal. Burlington, May 16, 1816.

"SENECA SINNICKSON (Seal).

"Witness, James S. Budd."

Defendant demurred generally, and plaintiff joined in demurrer.

KIRKPATRICK, C. J. . . . The contract was not only useless and nugatory, but it was contrary to the public policy.

Marriage lies at the foundation, not only of individual happiness, but also of the prosperity, if not the very existence, of the social state; and the law, therefore, frowns upon, and removes out of the way, every rash and unreasonable restraint upon it, whether by way of penalty or inducement.

If these parties had entered into mutual obligations, the plaintiff not to marry within six months, and the defendant to pay him therefor this sum of \$1000, there can be no doubt, I think, but that both the obligations would have been void. In the case of Key v. Bradshaw (2 Vern. 102), there was a bond in the usual form, but proved to be upon an agreement to marry such a man, or to pay the money mentioned in the bond; but the bond was ordered to be canceled it being contrary to the nature and design of marriage, which ought to proceed from free choice, and not from any restraint or compulsion. In the case of Baker v. White (2 Vern. 215), A gave her bond to B for £100 if she should marry again, and B gave her his bond for the same sum,

to go towards the advancement of her daughter's portion, in case she should not marry. It was, as Lord Mansfield says in Lowe v. Peers (Bur. 2231), a mere wager, and nothing unfair in it; and yet A was relieved against her bond, because it was in restraint of marriage, which ought to be free. A bond, therefore, to marry, if there be no obligation on the other side, no mutual promise, or a bond not to marry, are equally against law. They are both restraints upon the freedom of choice and of action, in a case where the law wills that all shall be free. If the consideration for which this money was to be paid, then, was the undertaking of the plaintiff not to marry, that consideration was unlawful. He would have been relieved against it, either at law or in equity; and if so, the corresponding obligation to pay, according to the principle above stated, is void.

It has been spoken of by the plaintiff, as if it were an obligation to pay money upon a future contingency, which any man has a right to make, either with or without consideration, and as if the not marrying of the plaintiff were not the consideration of the obligation, but the contingent event only, upon which it became payable. But I think this is not the correct view of the case. Where the event upon which the obligation becomes payable is in the power of the obligee, and is to be brought about by his doing or not doing a certain thing, it cannot be so properly called a contingency; it is rather the condition meritorious, upon which the obligation is entered into, the moving consideration for which the money is to be paid. It is not, therefore, to be considered as a mere contingency, but as a consideration, and it must be such consideration as the law regards.

Nor does it at all vary the case that the restraint was for six months only. It was still a restraint, and the law has made no limitation as to the time. Neither can the plaintiff's performance, on his part, help him. It imposed no obligation upon the defendant; it was wholly useless to him; the contract itself was void from the beginning. Therefore, in my opinion, let there be judgment for the defendant.

Judgment for defendant.1

1 "The substance of the contract is, if the applicant will pay the association a certain sum of money down, and agree to pay such dues and assess-

DUVAL v. WELLMAN. 124 NEW YORK, 156.—1891.

[Reported herein at p. 402.]

CROSS v. CROSS.

58 NEW HAMPSHIRE, 373. — 1878.

Writ of entry on a mortgage given by defendant to M. for plaintiff, in consideration that she should re-convey to him certain lands, and should then file a bill for divorce which he agreed not to defend. This agreement was executed, the divorce was granted, and M. assigned the notes and mortgage to plaintiff.

CLARK, J. When the notes and mortgage were given, the plaintiff was the wife of the defendant; and the principal object of the agreement, in pursuance of which the notes and mortgage were executed, was to obtain a collusive divorce. Such an agreement is contrary to sound public policy, and consequently illegal and void. The marriage contract is not to be dissolved or determined at the will or caprice of the parties. annulled, it must be in accordance with the requirements of the law, and in due course of legal proceedings. The whole agreement and proceedings of the parties in this case were a fraud upon the law, and if the facts had come to the knowledge of the court, a divorce would not have been granted. The law will not aid either party in enforcing their illegal contract. The consideration of the notes secured by the mortgage being illegal and void, the action cannot be maintained. The principles of law governing this case were considered and settled in Sayles v. Sayles, 21 N. H. 312, and Weeks v. Hill, 38 N. H. 199.

Judgment for the defendant.

ments as it may demand upon expressed terms from time to time, it will pay the applicant at the end of two years the sum of \$3960, upon condition that the applicant should not get married within that time, but if he should marry within that time, then the association was to pay him \$5.50 for each day that he remained single, after the execution of the contract. The amount to be paid by the association is dependent upon the time the member refrains from marriage. We think this contract is contrary to public policy and void. . . . A promise to pay money in consideration of not marrying cannot be enforced. 2 Parsons Con. 73, note (h)."—Franklin, C., in Chalfant v. Payton, 91 Ind. 202, 206, 207.

(η) Agreements in restraint of trade.

DIAMOND MATCH CO. v. ROEBER.

106 NEW YORK, 473. - 1887.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, made March 20, 1885, which modified as to an additional allowance of costs and affirmed, as modified, a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendant from engaging in the manufacture or sale of friction matches in violation of a covenant in a bill of sale executed by defendant, which is set forth in the opinion, wherein also the material facts are stated.

Two questions are presented: First. Whether Andrews, J. the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the 27th day of August, 1880, "that he shall and will not, at any time or times within ninety-nine years, directly or indirectly, engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employé of said The Swift & Courtney & Beecher Company), within any of the several States of the United States of America, or in the Territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the State of Nevada and in the Territory of Montana," is void as being a covenant in restraint of trade; and, second, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant.

There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth Street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks, and good will of

the business, for the aggregate sum (excluding a mortgage of \$5000 on the property, assumed by the company) of \$46,724.05, of which \$13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, \$28,000 of the purchase price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred August 27, 1880, by giving to the defendant the option to receive the \$28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1. 1881. The remainder of the purchase price, \$18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company. in full payment of the \$28,000, the sum of \$8000 in cash and notes, and \$20,000 in the stock of the plaintiff, the plaintiff company having, prior to said payment, purchased the property of the Swift & Courtney & Beecher Company and become the assignee of the defendant's covenant. It is admitted by the pleadings that in August, 1880 (when the covenant in question was made), the Swift & Courtney & Beecher Company carried on the business of manufacturing friction matches in the States of Connecticut, Delaware, and Illinois, and of selling the same "in the several States and Territories of the United States and in the District of Columbia;" and the complaint alleges, and the defendant in his answer admits, that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. proof tends to support the admission in the pleadings. shown that the defendant employed traveling salesmen, and that his matches were found in the hands of dealers in ten States. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the 27th of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of \$1500 a year. He then entered into the employment of the plaintiff and remained with it during the year 1881, at a salary of \$2500 a year, and from January 1, 1882, at a salary of \$3600 a year, when a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than \$2500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of \$5000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff. The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of \$15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case of Mitchel v. Reynolds (1 P. Williams, 181), and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality was considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on Coutracts, Vol. 2, p. 748, note. The earliest reported case, decided in the time of Henry V., was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indignantly denounced the plaintiff for procuring such a contract, and turned him out of court. This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place for a certain time, which apparently presented the same question which had been decided in the dyer's case, but the courts sustained the contracts and gave judgment for the plaintiffs; and, before the case of Mitchel v. Reynolds, it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstances and supported by a good consideration, was valid.

The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases, prior to Mitchel v. Reynolds, sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of Mitchel v. Reynolds was a case of partial restraint and the contract was sustained. It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in this State are of that character, and in all of them the particular contract before the court was sustained (Nobles v. Bates, 7 Cow. 307; Chappel v. Brockway, 21 Wend. 157; Dunlop v. Gregory, 10 N. Y. 241). In Alger v. Thacher (19 Pick. 51), the case was one of general restraint, and the court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In Mitchel v. Reynolds, the court, in assigning the reasons for the distinction between a contract in general restraint of trade, and one limited to a particular place, says, "for the former of these must be void, being of no benefit to either party and only oppressive;" and later on, "because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England, for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz.: The mischief which may arise (1) to the party by the loss, by the obligor, of his livelihood and the subsistence of his family; and (2) to the public, by depriving it of a useful member and by enabling corporations to gain control of the trade of the kingdom.

It is quite obvious that some of these reasons are much less forcible now than when *Mitchel* v. *Reynolds* was decided. Steam and electricity have, for the purposes of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth and the restless activity of mankind striving

to better their condition, has greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity, and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and, to a great extent, business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character.

The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England (Rousillon v. Rousillon, L. R. 14 Ch. Div. 351). The law has, for centuries, permitted contracts in partial restraint of trade, when reasonable; and in Horner v. Graves (7 Bing. 735), Chief Justice Tindal considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is coextensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint coextensive with the business which he sells? such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the

public is likely to lose a useful member of society in the one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammeled by unnecessary restrictions. "If," said Sir George Jessel, in *Printing Company* v. Sampson, L. R. 19 Eq. Cas. 462, "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice."

It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a con-

sideration, will depend upon its reasonableness as between the Combinations between producers to limit production and to enhance prices, are or may be unlawful, but they stand on a different footing. We cite some of the cases showing the tendency of recent judicial opinion on the general subject. Whittaker v. Howe, 3 Beav. 383; Jones v. Lees, 1 Hurl. & N. 189; Roussillon v. Roussillon, supra; Leather Co. v. Lorsont, L. R. 9 Eq. Cas. 345; Collins v. Locke, L. R. 4 App. Cas. 674; Oregon Steam Co. v. Winsor, 20 Wall. 64; Morse v. Morse, 103 Mass. In Whittaker v. Howe, a contract made by a solicitor not to practice as a solicitor "in any part of Great Britain," was held In Roussillon v. Roussillon, a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being under the circumstances a reasonable contract. In Jones v. Lees, a covenant by the defendant, a licensee under a patent that he would not during the license make or sell any slubbing machines without the invention of the plaintiff applied to them, was held valid. Bramwell, J., said: "It is objected that the restraint extends to all England, but so does the privilege." In Oregon Steam Co. v. Winsor, the court enforced a covenant by the defendant, made on the purchase of a steamship, that it should not be run or employed in the freight or passenger business upon any waters in the State of California for the period of ten years.

In the present state of the authorities we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed.

The covenant in the present case is partial and not general. It is practically unlimited as to time, but this, under the authorities, is not an objection, if the contract is otherwise good. Ward v. Byrne, 5 M. & W. 548; Mumford v. Gething, 7 C. B. (N. S.), 305, 317. It is limited as to space since it excepts the State of Nevada and the Territory of Montana from its operation, and therefore is a partial and not a general restraint, unless, as

claimed by the defendant, the fact that the covenant applies to the whole of the State of New York constitutes a general restraint within the authorities. In Chappel v. Brockway, supra, Bronson, J., in stating the general doctrine as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the State, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet boats on the canal between Rochester and Buffalo. The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the State of New York, but excepted other States from its operation. The remark relied upon was obiter, and in reason cannot be considered a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the States are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and allegiance are due both to the State and nation. Nor is it true, as a general rule, that a business established here cannot extend beyond the State, or that it may not be successfully established outside of the State. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of Oregon Steam Co. v. Winsor (supra) supports the view that a restraint is not necessarily general which embraces an entire State. The defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.

In respect to the second general question raised, we are of opinion that the equitable jurisdiction of the court to enforce the covenant by injunction, was not excluded by the fact that the defendant, in connecton with the covenant, executed a bond for its performance, with a stipulation for liquidated damages. It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. tion in that case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee in lieu of performance. Phanix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400, 405. But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated, does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. It was said in Long v. Bowring (33 Beav. 585), which was an action in equity for the specific performance of a covenant, there being also a clause for liquidated damages, "all that is settled by this clause is that if they bring an action for damages the amount to be recovered is £1000, neither more nor less." There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed, and not that the defendant might at his option repurchase his right to manufacture and sell matches on payment of the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases. Phænix Ins. Co. v. Continental Ins. Co., supra; Long v. Bowring, supra; Howard v. Woodward, 10 Jur. N. S. 1123; Coles v. Sims, 5 De

G., McN. & G. 1; Avery v. Langford, Kay's Ch. 663; Whittaker v. Howe, supra; Hubbard v. Miller, 27 Mich. 15.

There are some subordinate questions which will be briefly noticed.

First. The plaintiff, as successor of the Swift & Courtney & Beecher Company, and as assignee of the covenant, can maintain the action. The obligation runs to the Swift & Courtney & Beecher Company, "its successors and assigns." The covenant was in the nature of a property-right and was assignable, at least it was assignable in connection with a sale of the property and business of the assignors. Hedge v. Lowe, 47 Iowa, 137, and cases cited. Second. The defendant is not in a position which entitles him to raise the question that the contract with the Swift & Courtney & Beecher Company was ultra vires the powers of that corporation. He has retained the benefit of the contract and must abide by its terms. Whitney Arms Co. v. Barlow, 68 N. Y. 34. Third. The fact that the plaintiff is a foreign corporation is no objection to its maintaining the action. It would be repugnant to the policy of our legislation, and a violation of the rules of comity, to grant or withhold relief in our courts upon such a discrimination. Merrick v. Van Santvoord, 34 N. Y. 208; Hibernia Nat. Bank v. Lacombe, 84 Id. 367; Code Civ. Pro. § 1779. Fourth. The consent of the Swift & Courtney & Beecher Company to the purchase by the defendant of the business of Brueggemann did not relieve the defendant from his That transaction was in no way inconsistent therewith. Brueggemann was selling matches manufactured by the company, under an agreement to deal in them exclusively.

There are some questions on exceptions to the admission and exclusion of evidence. None of them present any question requiring a reversal of the judgment.

There is no error disclosed by the record and the judgment should, therefore, be affirmed.

All concur, except Peckham, J., dissenting.

Judgment affirmed.1

1 "The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the length

BISHOP v. PALMER.¹

146 MASSACHUSETTS, 469. - 1888.

[Reported herein at p. 380.]

SANTA CLARA &c. CO. v. HAYES.

76 CALIFORNIA, 387. - 1888.

[Reported herein at p. 376.]

of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts, and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground both here and in England. The cases in this court, which are the latest manifestations of the turn in the tide, are cited in the opinion of this case at General Term, and are Diamond Match Co. v. Roeber, 106 N. Y. 473; Hodge v. Sloan, 107 N. Y. 244; Leslie v. Lorillard, 110 N. Y. 519."—Peckham, J., in Matthews v. Associated Press, 136 N. Y. 333, 340.

"While the law, to a certain extent, tolerates contracts in restraint of trade or business when made between vendor and purchaser and will uphold them, they are not treated with special indulgence. They are intended to secure to the purchaser of the good will of a trade or business a guaranty against the competition of the former proprietor. When this object is accomplished it will not be presumed that more was intended."—Maynard, J., in Greenfield v. Gilman, 140 N. Y. 168, 173.

"In the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 West Va. 600; Chicago Gas &c. Co. v. People's Gas Co., 121 Illinois, 530; Western Union Telegraph Co. v. American Union Telegraph Co., 65 Georgia, 160."—Mr. Chief Justice Fuller, in Gibbs v. Consolidated Gas Co., 130 U. S. 396, 408, 409.

See also Richards v. American Desk &c. Co. (Wis.), 58 N. W. Rep. 787; Santa Clara &c. Co. v. Hayes, 76 Cal. 387, post, p. 376.

¹ See also Gamewell Fire Alarm Tel. Co. v. Crane, 160 Mass, 50.

§ 2. Effect of illegality upon contracts in which it exists.

(i.) When the contract is divisible.

ERIE RAILWAY CO. v. UNION LOCOMOTIVE AND EXPRESS CO.

35 NEW JERSEY LAW, 240. - 1871.

This suit was in case on promises. Defendants demurred generally to the whole declaration, and there was a joinder.

Beasley, C. J. Upon the argument before this court, the counsel for the defendants relied chiefly, in support of the demurrer, upon the proposition that the stipulation contained in the article of agreement, which gave to the plaintiffs the exclusive right to carry locomotives and tenders on trucks over the Erie road, was illegal. The principle that, as common carriers, the defendants were bound to exercise their office with perfect impartiality, in behalf of all persons who apply to them, and that, practicing this public employment, they cannot discharge themselves, by contract, from the obligation, was appealed to in support of this position.

The agreement between these parties was, in short, this: The firm of Kasson & Company, who were the assignors of the plaintiffs, the Union Locomotive and Express Company, agreed to provide "cars and trucks sufficient in size, strength, weight, and capacity whereon to carry all locomotive engines and tenders," and that they would be at the expense of loading and unloading the same; and for the motive power, which was to be supplied by the Erie Railway Company, the defendants, and for the unusual wear and strain of their railway, a certain compensation, which was stated in said articles of agreement, was promised to be paid. On their side, the Erie Railway Company agreed, in addition to the stipulations for providing motive power and giving the use of the road, that the cars of the assignors of plaintiffs should be the only cars employed in the transportation of locomotive engines and tenders. It is this last provision which gives rise to the objection already stated. It is insisted this stipulation gives the plaintiffs the exclusive control, on their own terms, of this branch of business; that it precludes all competition, and being the grant of a monopoly, is inconsistent with the purpose and

objects of the charter of the defendants, and with their character as common carriers. The question thus presented is one of much importance, and it should not, consequently, be decided except when it shall be an element essential to the judgment of the court in the particular case. That it is not such an element, on the present occasion, is obvious, for, let it be granted that the provision in question is illegal, and therefore void, still such concession cannot, in the least degree, impair the plaintiffs' right of action. The suit is not for a breach of this promise of the defendants, that no other cars but those of the plaintiffs shall be employed in this branch of the carrying business, but it is for the refusal of the defendants to permit the plaintiffs to transport locomotives and tenders, according to their contract, over the railway of the Erie Company. This latter stipulation, the violation of which forms the ground of action, is distinct and entirely separable from the former one, in which it is alleged the illegality before mentioned exists.

Admitting, then, for the purpose of the argument, the illegality insisted on, the legal problem plainly is this: whether, when a defendant has agreed to do two things, which are entirely distinct, and one of them is prohibited by law, and the other is legal and unobjectionable, such illegality of the one stipulation can be set up as a bar to a suit for a breach of the latter and valid one. This point was but slightly noticed on the argument; nevertheless, an examination of the authorities will show that the rule of law upon the subject has, from the earliest times, been at rest. It was unanimously agreed, in a case reported in the Year Books, 14 Henry VIII. 25, 26, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond, are against law, and some good and lawful, that in such case, the covenants or conditions which are against law are void ab initio, and the others stand good. And from that day to this, I do not know that this doctrine, to the extent of its applicability to this case, has anywhere been disallowed. the ground of the judgment in Chesman v. Nainby (2 Lord Raymond, 1456), that being a suit on an apprentice's bond. The stipulation alleged to have been broken was, that the apprentice would not carry on the business in which she was to be instructed.

within "the space of half a mile" of the then dwelling-house of the plaintiff. There was also a further stipulation that she should not carry on this business within half a mile of any house into which the plaintiff might remove. The suit was for a breach of the former stipulation, and it was admitted that the latter one was void, as imposing an unreasonable restraint on trade, and it was urged that, by force of this illegal feature, the whole contract was void. But the court were unanimously of opinion that as the breach was assigned upon that part of the condition which was good in law, therefore if the other part, to which exception was taken, was against law, yet that would not hinder the recovery upon part of the condition which was legal. The judgment was afterwards affirmed by the twelve judges, on an appeal to Parliament. 3 Bro. Parl. c. 349.

This rule of law was treated as settled, and was similarly applied in the modern cases of Mallan v. May, 11 M. & W. 653, and Price v. Green, 16 M. & W: 346. This same legal principle will be found to be discussed and illustrated by different applications in the following decisions: Gaskell v. King, 11 East, 165; 15 Ib. 440; Nicholls v. Stretton, 10 Adol. & El. N. S. 346; Chester v. Freeland, Ley R. 79; Sheerman v. Thompson, 11 Adol. & El. 1027.

These and other authorities which might be referred to, settle the rule, that the fact that one promise is illegal will not render another disconnected promise void. The doctrine will not embrace cases where the objectionable stipulation is for the performance of an immoral or criminal act, for such an ingredient will taint the entire contract, and render it unenforceable in all its parts, by reason of the maxim ex turpi causa non oritur actio. Nor will it, in general, apply where any part of the consideration is illegal, so that in the present case, if, upon the trial, it should appear that the plaintiffs have agreed to pay to the defendants more than the charter of the latter allows, it may become a question whether this suit will lie. There are many decisions to the effect that where there are a number of considerations, and any one of them is illegal, the whole agreement is avoided, this doctrine being put upon the ground of the impossibility of saying how much or how little weight the void portion may have had as

an inducement to the contract. But, at the present stage of the cause, the entire consideration of the promise sued on must be regarded by the court as unobjectionable, as there is nothing on the record to show any overcharge.

On the ground, then, that both the consideration and the promise, which is the foundation of the action, appear to be valid, the plaintiffs must have judgment on this demurrer.

It is proper to remark that as the demurrer is a general one to the whole declaration, I have considered only the cause of action set out in the first count.

Judgment for plaintiffs.1

SANTA CLARA VALLEY MILL AND LUMBER CO. v. HAYES et al.

76 CALIFORNIA, 387.-1888.

Action for damages for breach of contract. Judgment for defendants. Plaintiff appeals.

Defendants agreed to make and deliver to plaintiff during the year 1881 two million feet of lumber at eleven dollars per thousand, and not to manufacture any lumber to be sold during that period in the counties of Monterey, San Benito, Santa Cruz, or Santa Clara, except under the contract, and to pay plaintiff twenty dollars per thousand feet for any lumber so sold to others than plaintiff. This contract was a part of a scheme by which plaintiff got possession by ownership or lease of all the saw-mills in the vicinity of Felton, and shut down several of them to limit the supply of lumber, and to give plaintiff the control of that business.

SEARLES, C. J. . . . The contract was void as being against public policy, and the defendants, as they had a right to do, repudiated the contract. Plaintiff, who has parted with nothing

¹ Accord: United States v. Bradley, 10 Pet. 343, 360-364; Gelpcke v. Dubuque, 1 Wall. (U.S.) 221; Oregon Steam Nav. Co. v. Winsor, 20 Wall. (U.S.) 64; Dean v. Emerson, 102 Mass. 480; Peltz v. Eichele, 62 Mo. 171; Smith's Appeal, 113 Pa. St. 579. Contra: Lindsay v. Smith, 78 N. C. 328.

of value, now seeks to recover damages for non-delivery of lumber under this contract. Plaintiff had an undoubted right to purchase any or all the lumber it chose, and to sell at such prices and places as it saw fit, but when as a condition of purchase it bound its vendor not to sell to others under a penalty, it transcended a rule the adoption of which has been dictated by the experience and wisdom of ages as essential to the best interests of the community, and as necessary to the protection alike of individuals and legitimate trade.

With results naturally flowing from the laws of demand and supply, the courts have nothing to do, but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto.¹

It is claimed by appellant that the contract is divisible, and the first part can stand though the latter be illegal.

If the whole vice of the contract was embodied in the promise of the defendants not to sell lumber to other persons, the illegality would lie in the promise alone, and it might be contended with great force that this promise was divisible from the agreement to sell. Under the findings of the court, however, the illegality inheres in the consideration.

The very essence and mainspring of the agreement — the illegal object — "was to form a combination among all the manufacturers of lumber at or near Felton for the sole purpose of increasing the price of lumber, limiting the amount thereof to be manufactured, and give plaintiff control of all lumber manufactured," etc.

This being the inducement to the agreement, and the sole object in view, it cannot be separated and leave any subject matter capable of enforcement, as was done in *Granger* v. *Empire Co.*, 59 Cal. 678; *Treadwell* v. *Davis*, 34 Cal. 601; and *Jackson* v. *Shawl*, 29 Cal. 267.

The case falls within the rule of Valentine v. Stewart, 15 Cal. 404; Prost v. More, 40 Cal. 348; More v. Bonnet, 40 Cal. 251; Forbes v. McDonald, 54 Cal. 98; Arnot v. Pittston and Elmira Coal Co., 68 N. Y. 559.

¹ See also Oliver v. Gilmore, 52 Fed. Rep. 562.

The good cannot be separated from the bad, or rather the bad enters into and permeates the whole contract, so that none of it can be said to be good, and therefore the subject of an action. . . .

The judgment of the court below is affirmed.1

(ii.) When the contract is indivisible.

BIXBY v. MOOR.

51 NEW HAMPSHIRE, 402. - 1871.

Assumpsit, by Joseph C. Bixby against Moor & Gage, to recover pay for services rendered by the plaintiff for the defendants from October 1, 1861, to December 20, 1863. The defendants kept a billiard saloon and bar. The sale of liquor was illegal. The plaintiff was employed by the defendants to work generally in and about the saloon, but there was no special agreement that he should or should not sell liquors. He opened the saloon, built fires, took care of billiard tables, waited on customers at the bar, and in the absence of defendants had the whole charge of the business.

SMITH, J. The plaintiff would have been entitled to the reasonable worth of his entire services, if no part of them had been rendered in an illegal business. It must be conceded that he cannot recover for his services in the sale of liquor; but he claims that a portion of his services was rendered in a legal employment, and that he can recover the value of that portion. The defendants contend that no part of the services was rendered in a legal business, arguing that the keeping of the billiard tables was so far connected with and in furtherance of the liquor traffic, that it must be regarded as part and parcel of the same, falling under the same legal condemnation. Whether the latter position is well founded would seem to be a question of fact; but it need not be considered here, for we are of opinion that, even if part of the business was lawful, still the plaintiff cannot recover.

If the consideration for the defendants' promise to pay the plaintiff a reasonable compensation was the plaintiff's promise to

¹ Accord: Lindsay v. Smith, 78 N. C. 328.

perform both classes of services, the illegal as well as the legal, it is clear that the defendants' promise could not be enforced. A contract is invalid if any part of the consideration on either side is unlawful. See Metcalf on Contracts, 216-219. What the mutual promises were is a question of fact. The parties do not appear to have fully expressed in language the precise nature of the various services to be performed by the plaintiff, nor to have made any verbal bargain as to the mode of payment. In such cases it is sometimes said that "the law implies an agreement" as to the matters omitted to be explicitly stated in the verbal bargain. Strictly speaking, this is inaccurate. The agreement. though not fully expressed in words, is, nevertheless, a genuine agreement of the parties; it is "implied" only in this, that it is to be inferred from the acts or conduct of the parties instead of from their spoken words; "the engagement is signified by conduct instead of words." But acts intended to lead to a certain inference may "express a promise as well as words would have done." The term "tacit contract," suggested by Mr. Austin, describes a genuine agreement of this nature better than the phrase "an implied contract"; for the latter expression is sometimes used to designate legal obligations, which, in fact, are not contracts at all, but are considered so only by a legal fiction for the sake of the remedy. See Austin on Jurisprudence (3d ed.), 1018, 946; Am. Law Review, Vol. 5, pp. 11, 12; Metcalf on Contracts, 5, 6, 9, 10, 163, 164; Edinburgh Review, American reprint, Vol. 118, p. 239.

The questions arising in this case — What services did the plaintiff agree to perform? was it an entire contract? were there separate contracts, upon separate considerations, as to the legal and the illegal services? — are all questions of fact depending upon the mutual understanding of the parties; and if the nature of the agreed facts is such as to allow of a finding either way, it would be proper to submit the questions to a jury. In the present case, however, there is room for but one conclusion, namely, that the agreement was that the plaintiff, at the defendants' request, should perform all the services which he did in fact perform, and that the defendants, in consideration of the promise to perform (and the performance of) all those services, the illegal

as well as the legal, should pay the plaintiff the reasonable worth of the entire services. In other words, the plaintiff made an entire promise to perform both classes of services; this entire promise (and the performance thereof) formed an entire consideration for the defendants' promise to pay; and a part of this indivisible consideration was illegal. Walker v. Lovell (28 N. H. 138) and Carleton v. Woods (28 N. H. 290), cited by the plaintiff, are not in point. In those cases the different articles sold were valued separately in the sale. If the plaintiff had performed a class of services for each of which it is customary to pay a separate price (see, for instance, Robinson v. Green., 3 Metcalf, 159), the nature of the various services so performed might afford ground for the conclusion that the parties contemplated a separate payment for each service rendered. But it is not contended that it is customary to pay saloon-tenders separate prices for sweeping, for building fires, for acting as billiard markers, and for selling liquor.

In accordance with the provisions of the agreed case, unless the plaintiff elects trial by jury, there must be

Judgment for the defendants.1

BISHOP v. PALMER et al.

146 MASSACHUSETTS, 469. - 1888.

Contract. Demurrer sustained. Plaintiff appeals. Defendants purchased plaintiff's business for \$5000, the plaintiff agreeing to transfer to defendants his business at A and his business at B, and covenanting not to engage in the first business again anywhere for five years, or in the second, at B for five years, or to purchase any material from the rival concerns at B.

C. Allen, J. The defendants' promise which is declared on was made in consideration of the sale and delivery of the business, plant, property, and contracts of the plaintiff, and of his faithful performance of the covenants and agreements contained

¹ See also Handy v. St. Paul Globe Co., 41 Minn. 188, ante, p. 318; Foley v. Speir, 100 N.Y. 552. Cf. Shaw v. Carpenter, 54 Vt. 155.

in the written instrument signed by the parties. The parties made no apportionment or separate valuation of the different elements of the consideration. The business, plant, property, contracts, and covenants were all combined as forming one entire consideration. There is no way of ascertaining what valuation was put by the parties upon either portion of it. There is no suggestion that there was any such separate valuation, and any estimate which might now be put upon any item would not be the estimate of the parties.

It is contended by the defendants that each one of the three particular covenants and agreements into which the plaintiff entered is illegal and void, as being in restraint of trade. It is sufficient for us to say that the first of them is clearly so; it being a general agreement, without any limitation of space, that for and during the period of five years he will not, either directly or indirectly, continue in, carry on, or engage in the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form any part. This much is virtually conceded by the plaintiff, and so are the authorities. Taylor v. Blanchard, 13 Allen, 370; Dean v. Emerson, 102 Mass. 480; Morse Twist Drill Co. v. Morse, 103. Mass. 73; Alger v. Thacher, 19 Pick. 51; Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64; Davies v. Davies, 36 Ch. D. 359; 2 Kent Com. 466, note e; Met. Con. 232.

Two principal grounds on which such contracts are held to be void are, that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly. Alger v. Thacher, ubi supra.

The question then arises, whether an action can be supported upon the promise of the defendants, founded upon such a consideration as that which has been described. As a general rule, where a promise is made for one entire consideration, a part of which is fraudulent, immoral, or unlawful, and there has been no apportionment made or means of apportionment furnished by the parties themselves, it is well settled that no action will lie upon the promise. If the bad part of the consideration is not severable from the good, the whole promise fails. Robinson v.

Green, 3 Met. 159, 161; Rand v. Mather, 11 Cush. 1; Woodruff v. Wentworth, 133 Mass. 309, 314; Bliss v. Negus, 8 Mass. 46, 51; Clark v. Ricker, 14 N. H. 44; Woodruff v. Hinman, 11 Vt. 592; Pickering v. Ilfracombe Railway, L. R. 3 C. P. 235, 250; Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549; 2 Chit. Con. (11th Am. ed.) 972; Leake, Con. 779, 780; Pollock, Con. 321; Met. Con. 247.

It is urged that this rule does not apply to a stipulation of this character, which violates no penal statute, which contains nothing malum in se, and which is simply a promise not enforceable at law. But a contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is therefore deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. Being so, it rests on the same ground as if such contracts were forbidden by positive statute. They are forbidden by the common law, and are held to be illegal. 2 Kent Com. 466; Met. Con. 221; 2 Chit. Con. 974; White v. Buss, 3 Cush. 448, 450; Hynds v. Hays, 25 Ind. 31, 36.

It is contended that the defendants, by being unable to enforce the stipulation in question, only lose what they knew or were bound to know was legally null; that they have all that they supposed they were getting, namely, a promise which might be kept, though incapable of legal enforcement; and that if they were content to accept such promise, and if there is another good and sufficient consideration, they may be held upon their promise. But this argument cannot properly extend to a case where a part of an entire and inseparable consideration is positively vicious, however it might be where it was simply invalid, as in Parish v. Stone, 14 Pick. 198. The law visits a contract founded on such a consideration with a positive condemnation, which it makes effectual by refusing to support it, in whole or in part, where the consideration cannot be severed.

The fact that the plaintiff had not failed to perform his part of the contract does not enable him to maintain his action. An illegal consideration may be actual and substantial and valuable; but it is not in law sufficient.

The plaintiff further suggests that, if the defendants were to

sue him on this contract, they could clearly, so far as the question of legality is concerned, maintain an action upon all its parts, except possibly the single covenant in question. Mallan v. May, 11 M. & W. 653; Green v. Price, 13 M. &. W. 695; S. C. 16 M. & W. 346. This may be so. If they pay to the plaintiff the whole sum called for by the terms of the contract, it may well be that they can call on him to perform all of his agreements except such as are unlawful. In such case, they would merely waive or forego a part of what they were to receive, and recover or enforce the rest. It does not, however, follow from this that they can be compelled to pay the sum promised by them, when a part of the consideration of such promise was illegal. are at liberty, to repudiate the contract on this ground; and, having done so, the present action founded on the contract cannot be maintained; and it is not now to be determined what other liability the defendants may be under to the plaintiff, by reason of what they may have received under the contract.

Judgment affirmed.

(iii.) Comparative effect of avoidance and illegality.

HARVEY v. MERRILL.

170 MASSACHUSETTS, 1.-1889.

Contract to recover for losses incurred by the plaintiffs, in the purchase and sale of pork on the Chicago Board of Trade for the defendants, and for their commissions as brokers. The case was referred to an auditor. The auditor found for the defendants, on the ground that, under the guise of contracts, the real intent was to speculate on the rise and fall of prices, and not to receive or deliver the actual commodities, and therefore that the contracts were wagers. At the trial, the auditor's report was the only evidence introduced, and the court directed a verdict for the plaintiffs. Defendants alleged exceptions.

FIELD, J. The rights of the parties are to be determined by the law of Illinois, but there is no evidence that the common law of Illinois differs from that of Massachusetts. We cannot take notice of the statutes of Illinois, except so far as they are set out in the auditor's report; and the auditor has set out but one statutory provision of that State, and has found that the parties have not acted in violation of that. We are therefore to determine whether the contract between the parties, as the auditor has found it to be, is illegal and void by the common law of Massachusetts.

It is not denied that, if, in a formal contract for the purchase and sale of merchandise to be delivered in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering contract. however, it is agreed by the parties that the contract shall be performed according to its terms, if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract, because one or both of the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices.

The construction which we think should be given to the auditor's report is, that he finds that the contracts which the plaintiffs made on the board of trade with other members of that board, were not shown to be wagering contracts, and that the contract which the defendants made with the plaintiffs was, that the defendants should give orders, from time to time, to the plaintiffs for the purchase and the sale on account of the defendants of equal amounts of pork to be delivered in the future; that

the plaintiffs should, in their own names, make these purchases and these sales on the board of trade; that the plaintiffs should, at or before the time of delivery, procure these contracts to be set off against each other, according to the usages of that board; that the defendants should not be required to receive any pork and pay for it, or to deliver any pork and receive the pay for it, but should only be required to pay to the plaintiffs, and should only be entitled to receive from them, the differences between the amounts of money which the pork was bought for and was sold for; and that the defendants should furnish a certain margin, and should pay the plaintiffs their commissions.

The defendants gave orders in pursuance of this contract, the plaintiffs made the purchases and sales on the board of trade, set them off against each other, and now sue the defendants for the differences which they have paid, and for their commissions.

The auditor has found that "in a vast majority of the transactions of the board of trade, settlement was made by the set-off of opposite contracts." In his supplemental report he says: "My conclusion is unchanged, that the parties to this suit entered into the dealings with each other which are the subject thereof with a clear understanding that actual deliveries were not contemplated and were not to be enforced; and it appears to me that the question whether the members of this board with whom the defendants dealt had such an understanding with each other, is not material to the issue of this case."

The peculiarity of this case, according to the findings of the auditor is, that while the contracts which the plaintiffs made on the board of trade must be taken to be legal, the plaintiffs have undertaken to agree with the defendants that these contracts should not be enforced by or against them, except by settlements according to differences in prices. If such an agreement seems improbable, it is enough to say that the auditor has found that it was made. The usages of the board of trade were such that the plaintiffs might well think that they risked little or nothing in making such an agreement. Indeed, the distinction in practice between the majority of contracts which by the auditor's report appear to be made and settled on the board of trade, and wagering contracts, is not very plain, and brokers, for the pur-

pose of encouraging speculation and of earning commissions, might be willing to guarantee to their customers that the contracts made by them on the board of trade should not be enforced, except by a settlement, according to differences in prices.

We do not see why the agreement between the plaintiffs and the defendants, that the defendants should not be required to receive or deliver merchandise, or to pay for or receive pay for merchandise, but should be required to pay to and to receive from the plaintiffs only the differences in prices is not, as between the parties, open to all the objections which lie against wagering contracts. On the construction we have given to the auditor's report, the plaintiffs, in their dealings with the defendants, in some respects acted as principals. In making the contracts on the board of trade with other brokers, they may have been agents of the defendants. In agreeing with the defendants that they should not be compelled to perform or accept performance of the contracts so made, the plaintiffs acted for themselves as principals. If the defendants had made a contract with the plaintiffs to pay and receive the differences in the prices of pork ordered to be bought and sold for future delivery, with the understanding that no pork was to be bought or sold, this would be a wagering contract. On such a contract, the defendants would win what the plaintiffs lose, and the plaintiffs would win what the defendants lose. But so far as the defendants are concerned, the contracts which the auditor has found they made with the plaintiffs, are contracts on which they win or lose according to the rise or fall in prices, in the same manner as on wagering contracts. If the plaintiffs, by virtue of the contracts they made with other members of the board of trade, were bound to receive or deliver merchandise and to pay or receive the price therefor, on the auditor's finding they must be held as against the defendants to have agreed to do these things on their own account, and that the defendants should only be bound to pay to them, and to receive from them, the differences in prices. If the defendants, as undisclosed principals, should be held bound to other members of the board of trade on the contracts made by the plaintiffs, the plaintiffs, by the terms of their employment, would be bound to indemnify the defendants, except so far as the contracts were settled, by a payment of differences in prices. The agreement of the parties, as the auditor has found it, excludes any implied liability on the part of the defendants to indemnify the plaintiffs, except for money paid in the settlement of differences in prices. The position of the plaintiffs towards the defendants is no better than it would have been if the plaintiffs had been employed to make wagering contracts for pork on account of the defendants, and had made such contracts, because the plaintiffs, relying upon the usages of the board of trade, have undertaken to agree with the defendants that whatever contracts they make shall bind the defendants only as wagering contracts, and shall be settled as such.

The plaintiffs contend that, even if the contracts which the defendants authorized them to make, and which they made on the board of trade, had been wagering contracts, yet they could recover whatever money they had paid in settlement of these contracts in the manner authorized by the defendants.

In Thacker v. Hardy (4 Q. B. D. 685) the court found that the plaintiff was employed to make lawful contracts, and ruled that the understanding between the plaintiff and his customer, that the contract should be so managed that only differences in prices should be paid, did not violate the provisions of 8 & 9 Vict. c. 109, § 18. Lindley, J., in giving the opinion at the trial, said, p. 687:

"What the plaintiff was employed to do was to buy and sell on the Stock Exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendant and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged. Now if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming in a court of law any indemnity from the defendant in respect of the liabilities he had incurred. Cannan v. Bryce, 3 B. & Ald. 179; M'Kinnell v. Robinson, 3 M. & W. 434; Lyne v. Siesfield, 1 H. & N. 278. But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. Fitch v. Jones (5 E. & B.), 238 is plain to that effect."

On appeal, Brett, L. J., said, at p. 694:

"It was further suggested in Cooper v. Neil (W. N. 1 June, 1878), that the agreement was, that although the plaintiff being broker to the defendant, but contracting in his own person as principal, should enter into real bargains, yet the defendant should be called upon only to pay the loss if the market should be unfavorable, and should receive only the profit if it proved favorable; and that no further liability should accrue to the principal, whatever might become of the broker upon the Stock Exchange; so that, as regarded the real principal, the defendant in the action, it should be a mere gambling transaction. I then considered that a transaction of that kind might fall within the provisions of 8 and 9 Vict. c. 109, § 18, but I thought that there was no evidence of it. And with respect to the present action, I say that there is no evidence that the bargain between the parties amounted to a transaction of that nature. I retract nothing from what I said in that case."

In England, wagering contracts concerning stocks or merchandise are not illegal at common law, and all the judges in *Thacker* v. *Hardy* were of opinion that the facts in that case did not show that the transactions between the parties were in violation of the statute.

In Irwin v. Williar (110 U. S. 499, 510) the Supreme Court of the United States says of wagering contracts:

"In England it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable (Thacker v. Hardy, ubi supra); while generally, in this country, all wagering contracts are held to be illegal and void as against public policy. Dickson's Executor v. Thomas, 97 Penn. St. 278; Gregory v. Wendell, 40 Mich. 432; Lyon v. Culbertson, 83 Ill. 33; Melchert v. American Union Telegraph Co., 3 McCrary, 521; S. C. 11 Fed. Rep. 193 and note; Barnard v. Backhaus, 52 Wis. 593; Kingsbury v. Kirwan, 77 N. Y. 612; Story v. Salomon, 71 N. Y. 420; Love v. Harvey, 114 Mass. 80."

In considering how far brokers would be affected by the illegality of contracts made by them, that court says:

"It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful designs of the parties, and brings them together for the very purpose of

entering into an illegal agreement, he is particeps criminis, and cannot recover for services rendered or losses incurred by himself on the behalf of either in forwarding the transaction."

This was decided in Embrey v. Jemison, 131 U. S. 336. See also Kahn v. Walton (Ohio, 1888), 20 N. E. Rep. 203; Cothran v. Ellis, 125 Ill. 496; Fareira v. Gabell, 89 Penn. St. 89; Crawford v. Spencer, 92 Mo. 498; Lowry v. Dillman, 59 Wis. 197; Whitesides v. Hunt, 97 Ind. 191; First National Bank v. Oskaloosa Packing Co., 66 Iowa, 41; Rumsey v. Berry, 65 Maine, 570.

It is not denied that wagering contracts are void by the common law of Massachusetts; but it is argued that they are not illegal, and that, if one pays money in settlement of them at the request of another, he can recover it of the person at whose request he pays it. It is now settled here, that contracts which are void at common law, because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void. They are prohibited by law because they are considered vicious, and it is not necessary to impose a penalty in order to render them illegal. Bishop v. Palmer, 146 Mass. 469; Gibbs v. Consolidated Gas Co., 130 U.S. 396. The weight of authority in this country is, we think, that brokers who knowingly make contracts that are void and illegal as against public policy, and advance money on account of them at the request of their principals, cannot recover either the money advanced or their commissions, and we are inclined to adopt this view of the law. Embrey v. Jemison, 131 U.S. 336, ubi supra, and the other cases there cited.

We are of opinion that the instruction of the presiding justice, that on the auditor's report the plaintiffs were entitled to a verdict, cannot be sustained. Whether on the auditor's report the defendants were entitled to a ruling directing the jury to render a verdict in their favor, or whether the case should have been submitted to the jury for the reasons stated in *Peaslee* v. *Ross* (143 Mass. 275), is a question which has not been carefully argued, and upon which we express no opinion.

Exceptions sustained.1

¹ See the cases following. Also Shaffner v. Pinchback, 133 Ill. 410; Deaver v. Bennett, 29 Neb. 812.

(iv.) The intention of the parties.

TYLER v. CARLISLE.

79 MAINE, 210. — 1887.

Assumpsit. Verdict for defendant.

Peters, C. J. The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling, at the trial, was that, if the plaintiff let the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered; but otherwise, if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct.

Any different doctrine would, in most instances, be impracticable and unjust. It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,—to the man, and not to his purpose. He may at the same time disapprove his purpose. He may not be willing to deny his friend, however much disapproving his acts.

In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower—a union of purposes. The lender must in some manner be a confederate or participator in the borrower's act, be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man. In support of this view many cases might be adduced. A few prominent ones will suffice. Green v. Collins, 3 Cliff. 494; Gaylord v. Soragen, 32 Vt. 110; Hill v. Spear, 50 N. H. 252; Peck v. Briggs, 3 Denio, 107; M'Intyre v. Parks, 3 Met. 207; Banchor v. Mansel, 47 Maine, 58. (See 68 Maine, p. 47.)

Nor was the branch of the ruling wrong, that plaintiff, even though a participator, could recover his money back, if it had not been actually used for illegal purposes. In the minor offenses, the locus pænitentiæ continues until the money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract or the illegal purpose has not been put in operation. The lender can cease his own criminal design and reclaim his money. "The reason is," says Wharton, "the plaintiff's claim is not to enforce, but to repudiate, an illegal contract." Whar. Con. § 354, and cases there cited. The object of the law is to protect the public—not the parties. "It best comports with public policy, to arrest the illegal transaction before it is consummated," says the court in Stacy v. Foss, 19 Maine, 335. See White v. Bank, 22 Pick. 181.

The rule allowing a recovery back does not apply where the lender knows that some infamous crime is to be committed with the means which he furnishes. It applies only where the minor offenses are involved.

Exceptions overruled.1

GRAVES et al. v. JOHNSON.

156 MASSACHUSETTS, 211. - 1892.

Holmes, J. This is an action for the price of intoxicating liquors. It is found that they were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel keeper, with a view to their being resold by the defendant in Maine, against the laws of that State. These are all the material facts reported; and these findings we must assume to have been warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit the sales is open. The only question is, whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if

¹ See also Hull v. Ruggles, 56 N. Y. 424.

the action were brought there. It is noticeable, and it has been observed by Sir F. Pollock, that some of the English cases which have gone farthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. Holman v. Johnson, 1 Cowp. 341; Pollock, Con. (5th ed.) 308. See also M'Intyre v. Parks, 3 Met. 207.

The assertion of that right, however, no doubt was in the interest of English commerce (Pellecat v. Angell, 2 Cr., M. & R. 311, 313), and has not escaped criticism (Story, Confl. Laws, §§ 257, 254, note; 3 Kent Com. 265, 266; and Wharton, Confl. Laws, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws. See Hodgson v. Temple, 5 Taunt. 181; Brown v. Duncan, 10 B. & C. 93, 98, 99; Harris v. Runnels, 12 How. 79, 83, 84.

Of course it would be possible for an independent State to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbor's laws. But in fact no State pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break the laws of a foreign country would be invalid. *Pollock, Con.* (5th ed.) 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring State, and requires an act on the part of the seller in furtherance of the scheme. *Waymell* v. *Reed*, 5 T. R. 599; *Gaylord* v. *Soragen*, 32 Vt. 110; *Fisher* v. *Lord*, 63 N. H. 514; *Hull* v. *Ruggles*, 56 N. Y. 424, 429.

On the other hand, plainly, it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law; he must have known the intention in fact. Finch v. Mansfield, 97 Mass. 89, 92; Adams v. Coulliard, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act. Hayes v. Hyde Park, 153 Mass. 514, 515, 516.

Between these two extremes a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale, that the seller merely knows that the buyer intends to resell, in violation even of the domestic law. Tracy v. Talmage, 4 Kernan, 162; Hodgson v. Temple, 5 Taunt. 181. So, of the law of another State. M'Intyre v. Parks, 3 Met. 207; Sortwell v. Hughes, 1 Curt. C. C. 244; Green v. Collins, 3 Cliff. 494; Hill v. Spear, 50 N. H. 253; Dater v. Earl, 3 Gray, 482, in a decision on New York law.

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way. Finch v. Mansfield, 97 Mass. 89, 92; Suit v. Woodhall, 113 Mass. 391, 395. And the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law. Pearce v. Brooks, L. R. 1 Ex. 213; Taylor v. Chester, L. R. 4 Q. B. 309, 311.

However this may be, it is decided that when a sale of intoxicating liquor in another State has just so much greater proximity to a breach of the Massachusetts law as is implied in the statement that it was made with a view to such a breach, it is void. Webster v. Munger, 8 Gray, 584; Orcutt v. Nelson, 1 Gray, 536, 541; Hubbell v. Flint, 13 Gray, 277, 279; Adams v. Coulliard, 102 Mass. 167, 172, 173. Even in Green v. Collins and Hill v. Spear, the decision in Webster v. Munger seems to be approved. See also Langton v. Hughes, 1 M. & S. 593; M'Kinnell v. Robinson, 3 M. & W. 434, 441; White v. Buss, 3 Cush. 448. If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale on the principles explained in Hayes v. Hyde Park, 153 Mass. 514, and Tasker v. Stanley, 153 Mass. 148. The overt act of selling which otherwise would be too remote from the apprehended result, an unlawful sale by some one else, would be connected with it, and taken out of the protection of the law by the fact that the result was actually intended. We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place, whatever the buyer had been expected to do with the goods. But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine — the tendency of the act to produce the result - is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. Compare Commonwealth v. Churchill, 136 Mass. 148, 150. It appears to us not unreasonable to draw the line as it was drawn in Webster v. Munger, and to say that, when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained. the sale is void. The accomplice is none the less an accomplice because he is paid for his act. See Commonwealth v. Harrington, 3 Pick. 26.

The ground of the decision in Webster v. Munger is, that contracts like the present are void. If the contract had been valid, it would have been enforced. Dater v. Earl, 3 Gray, 482; M'Intyre v. Parks, 3 Met. 207. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the lex fori. For if such a distinction is ever sound, and again, if the same principles are not always to be applied, whether the law to be violated is that of the State of the contract or of another State (see Tracy v. Talmage, 4 Kernan, 162, 213), at least the right to contract with a view to a breach of the laws of another State of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong, shared by a large part

of our own citizens. Territt v. Bartlett, 21 Vt. 184, 188, 189. In the opinion of a majority of the court, this case is governed by Webster v. Munger, and we believe that it would have been decided as we decide it, if the action had been brought in Maine instead of here. Banchor v. Mansel, 47 Maine, 58.

Exceptions sustained.

(v.) Securities for money due on an illegal transaction.

BROWN v. KINSEY.

81 NORTH CAROLINA, 245. - 1879.

DILLARD, J. The case in the court below was four appeals from a justice's court, founded on four bonds executed by the testator of the defendant on the 13th of September, 1872, to Winefred Hill, and assigned to her after due to the plaintiff. By order of the court, the actions were consolidated, and the trial was had by a jury on the issue joined on the plea of immoral consideration, and the evidence relied on by the defendant being all in, His Honor being of opinion that the same was not such as reasonably to warrant a finding of the matter of avoidance pleaded, so held. Thereupon the verdict was for the plaintiff, and the defendant appealed.

The question on the appeal is whether the evidence adduced was or was not such as in law to authorize and require the judge to submit it to the jury upon which to find the fact of immoral consideration alleged by the defendant.

The evidence was that the testator of defendant died in October, 1872, and that about five years before his death Winefred Hill, the assignor of the plaintiff, gave birth to a bastard child begotten by him (said testator), and afterwards, in the course of the same illicit intercourse, he executed to her a bond under seal for three hundred dollars. Winefred, on her death, said he owed her nothing, and that when the bond was delivered to her, testator made no declaration as to his reason, or to the consideration moving him thereto. Upon the death of testator's wife, the said Winefred went to live in the house of testator, and took

charge of his domestic business about a month before the testator died. And whilst there, on the 13th of September, 1872, during the continuance of the immoral connection, the testator took up the bond for \$300 and destroyed it, and then and there executed to said Winefred the four bonds now in suit, one of them falling due on each first day of January in the next four succeeding years, stating at the time that they were executed in place of the bond for \$300, and he made no declaration to the motive for the substitution or the consideration on which they were founded.

Upon the issue joined, the bonds under which the plaintiff claims, being under seal, the execution and delivery made them effectual at law, made them deeds, things done; and by the common law they had the force and effect to authorize plaintiff to recover without any consideration, with power, however, in the defendant to have the same held null upon proof of illegal or immoral consideration, not from any motive of advantage to him or his testator, but from consideration of the public interest and of morality. Harrell v. Watson, 63 N. C. 454; 2 Chitty on Contracts, 971; Collins v. Blantem, 1 Smith's Lead. Cases, 153.

On the trial, then, we are to take it that plaintiff was absolutely entitled to recover, unless the defendant showed the immoral consideration alleged, by evidence full and complete, or by proof of such facts and circumstances as would reasonably warrant a jury to find it as a fact. In other words, the onus was on the defendant, and in order to defeat the recovery it was incumbent on him to show that the bonds were not voluntary, that is, not executed as a mere gift, and not on the consideration of past cohabitation, which is legal, but on the consideration in whole or part for future criminal intercourse, or to show that the nature of the securities was such as to hold out inducement or constitute a temptation to Winefred Hill to continue the counection.

It is indisputable that the bonds, if executed as a gift by the testator of the defendant to Winefred Hill, the mother of his bastard child, would be legal and enforceable, it not being immoral to assist her by gift to raise his progeny; and it is equally settled that if they were given for past cohabitation, they would be binding on the ground that the illicit connection was an evil

already past and done, and the public had no interest to defeat them. The only restriction put on the contracts of the parties is that they shall not stipulate for future fornication, or in such manner as that the security given shall operate as an inducement or motive to go on in the vicions course. 2 Chitty on Contracts, 979; Trovinger v. McBurney, 5 Cowen, 253; Gray v. Mathias, 5 Vesey's Ch. Rep. 286.

In these cases it is held that the continuation of the criminal intercourse after the execution of the bond or contract impeached for immorality, does not invalidate the same; but that it is to be avoided and held null only on proof that it was executed in whole or part on the understanding that the connection was to continue. This will be apparent from the following extracts taken therefrom: In the case of Trovinger v. McBurney, supra, the court say: "A bond executed for the cause of past cohabitation, although the connection is continued, is not invalidated thereby." The test always is, does it appear by the contract itself, or was there any understanding of the parties, though not expressed, that the connection was to continue. In the case of Gray v. Mathias, supra, a bond was given during the cohabitation, and in the course of the cohabitation, a second bond was given, which, upon its face, recited the existing illegal connection, and stipulated for its continuance with an annuity for the woman in case of discontinuance, and it was held that the last bond was void, but the former one was good, although the cohalitation continued after its execution.

In the case of *Hall* v. *Palmer* (3 Hare, 532) the bond was executed to the woman conditioned to pay an annuity from and after the death of the obligor, and the parties lived together at the time and continued so to live afterwards, upon a declaration of the obligor that he did not intend to break off the connection; and upon a reference to the master, it being found as a fact that it was given for past cohabitation, it was held that the continuance of the connection after the execution of the obligation had no effect to invalidate it.

From the principles decided in these cases, it may be taken as settled, that the cohabitation of the testator of defendant with Winefred Hill, after the execution of the bonds to her, did not by

any legal presumption invalidate the same; and that the same could only be held void on proof that there was an understanding, express or implied, that the criminal intercourse was to be continued. Applying these principles to our case we have this state of things: At the time the first bond for \$300 was given, Winefred testified that testator of defendant owed her nothing, and therefore the bond was voluntary; or if not that, then it may have been on consideration of past cohabitation, and if so, it was valid; or it may have been partly for past and partly for future, or altogether for future intercourse, and if the latter, then the onus was on the defendant to prove it otherwise than by mere evidence of a continued connection after the bonds were executed.

The defendant, on the trial of the issue, had no proof, except of the execution of the bonds in the course of an illegal intimacy between the parties, and a continuation thereof afterwards up to the death of the testator, together with an admission by Winefred, that they were not executed for any debt due to her; and obviously, in such state of the proof, the jury could not have done more than have a suspicion and conjecture, whether the bonds were executed as a gift, or for past cohabitation, or wholly or in part for future cohabitation.

The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue, or furnish more than materials for a mere conjecture, the court will not leave the issue to be passed on by the jury, but rule that there is no evidence to be submitted to their consideration, and direct a verdict against that party on whom the burden of proof is. State v. Waller, 80 N. C. 401; State v. Patterson, 78 N. C. 470; Sutton v. Madre, 2 Jones, 320; Cobb v. Fogalman, 1 Ire. 440.

In our opinion, therefore, the judge properly held that there was no evidence of the illegal or immoral consideration alleged, and in so doing he committed no error.

No error. Affirmed.¹

¹ See also Singleton v. Bremar, Harp. (So. Car.) 201; Given v. Driggs, 1 Caines Rep. (N. Y.) 450; Edwards v. Skirving, 1 Brevard (So. Car.) 548; Swan v. Scott, 11 Sergeant & Rawle (Pa.) 155.

NEW v. WALKER.

108 INDIANA, 365. - 1886.

Action on a promissory note. Defense, illegality of consideration. Reply, purchase before maturity, for value, and without knowledge of illegality. Demurrer to reply. Demurrer sustained. Plaintiff appeals.

Defendant gave the note in question for the purchase price of a patent right. By the statute, all sales of patent rights are unlawful when the seller has not filed with the clerk of the court of the county where the sale is made copies of the letters patent, and an affidavit that the letters are genuine, etc., and all obligations given for the purchase price of such patent rights are required to contain the words "given for a patent right." Noncompliance with the statute is made a misdemeanor. The payee of the note in question had not complied with this statute.

ELLIOTT, C. J. . . . In our opinion, a promissory note executed in direct violation of a mandatory statute, is inoperative as between the parties and those who buy with notice. Where a statute, in imperative terms, forbids the performance of an act, no rights can be acquired by persons who violate the statute, nor by those who know that the act on which they ground their claim was done in violation of law. A promissory note, executed in a transaction forbidden by statute, is at least illegal as between the parties and those who have knowledge that the law was violated. It is an elementary rule that what the law prohibits, under a penalty, is illegal, and it cannot, therefore, be the foundation of a right as between the immediate parties. Wilson v. Joseph, 107 Ind. 490; Hedderich v. State, 101 Ind. 571, 51 Am. R. 768; Case v. Johnson, 91 Ind. 477.

This rule also applies to those who assume to purchase from one of the parties to the transaction, but purchase with full knowledge that the law has been transgressed.

Having determined that the promissory note, on which the action is founded, is negotiable as commercial paper, the next question is, what are the rights of the appellant as the bona fide

holder of the paper? For there can be no doubt under the confessed allegations of the reply that she is such a holder. She is such in the strongest light, for she purchased from a good-faith owner, and is herself free from fault and innocent of wrong. Hereth v. Merchants' Nat. Bank, 34 Ind. 380; Newcome v. Dunham, 27 Ind. 285.

The decisions agree that, where the statute in direct terms declares that a note given in violation of its provisions shall be void, it is so no matter into whose hands it may pass. The rule is thus stated by the court in *Vallett* v. *Parker* (6 Wend. 615): "Wherever the statute declares notes void, they are and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of the consideration."

It is said by a late writer, in stating the same general rule, that, "when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it." 1 Daniel Negotiable Int. § 197. We regard this author's statement as substantially expressing the general rule, and, accepting it as correct, the pivotal question is whether our statute does expressly, or by necessary implication, declare that notes given to vendors of patent rights who have disobeyed the law shall be void? There is certainly no express declaration in the statute that such notes shall be void, nor do we think that there is any necessary implication that they shall be void. A man may be guilty of a misdemeanor, and yet notes taken by him in the transaction which creates his guilt may not be void in the hands of an innocent holder. A familiar illustration of this principle is afforded by those cases which declare that a note given in consideration of the suppression of a criminal prosecution is inoperative as between the immediate parties, but valid in the hands of a bona fide purchaser. This is the settled law, although the compounding of a felony is made a crime by statute. Our opinion is, that a statute making it a crime to take promissory notes in a prohibited transaction does not make the notes void in the hands of innocent purchasers, although the person who violates the statute commits a crime. This conclusion is well sustained by authority. Anderson v. Etter, 102 Ind. 115; Vallett v. Parker, supra; Taylor v. Beck, 3 Rand. (Va.) 316; Glenn v. Farmers' Bank, 70 N. C. 191; Smith v. Columbus State Bank, 9 Neb. 31; Haskell v. Jones, 86 Pa. St. 173; Palmer v. Minar, 8 Hun, 342; Cook v. Weirman, 51 Iowa, 561.

A party who executes a promissory note, negotiable as commercial paper, fair on its face and complete in all its parts, puts in circulation an instrument which he knows is the subject of barter and sale in the commercial world, and it is his own fault if he does not put into it the words which will warn others not to buy it in the belief that it will be free from all defenses. The experience of the business world has shown the necessity of affixing to promissory notes the quality of negotiability, and commercial transactions would be seriously disturbed if notes, fair on their face, and containing the required words of negotiability, were not protected in the hands of innocent purchasers. It is, therefore, not the policy of the law to multiply exceptions to the general rules governing notes negotiable by the law merchant, so that in such a case as this it cannot, without an indefensible departure from that policy, be held that the promissory note is not protected in the hands of a good-faith holder.

Nor can such a step be taken without wandering from the course marked and defined by the long-established principle that, where one of two innocent persons must suffer from the act of a third person, he who puts it in the power of the third to do the act must bear the loss. To our minds it seems clear that this principle rules here, for the man who executes to a vendor of patent rights a promissory note, in full and perfect form, puts it in his power to wrong others by selling the note as an article of commerce.

We regard the reply as unquestionably good, and adjudge that the trial court erred in sustaining the demurrer to it.

Judgment reversed.1

¹ See also Glenn v. Farmers' Bank, 70 N. C. 191; Singleton v. Bremar, Harper (So. Car.), 201; Coulter v. Robertson, 14 Smedes & Marshall (Miss.), 18; Traders' Bank v. Alsop, 64 Ia. 97. See on usury contracts, Kendall v. Robertson, 12 Cush. (Mass.) 156; Wortendyke v. Meehan, 9 Neb. 221.

(vi.) Can a man be relieved from a contract which he knew to be unlawful?

DUVAL v. WELLMAN.

124 NEW YORK, 156. - 1891.

Appeal from order of the General Term of the Court of Common Pleas for the city of New York, made May 4, 1888, which reversed an order of the General Term of the City Court, which reversed an order of the Special Term of said court denying a motion for a new trial.

This action was brought to recover back moneys paid by plaintiff's assignor to defendant upon contracts set forth in the opinion, in which the material facts are also stated.

Brown, J. The record before us does not contain the pleadings, and we are not informed of the grounds upon which the plaintiff therein based his right to recover. The case has, however, been disposed of in defendant's favor in the court below on the ground that the contract between the parties, upon which the money was paid, was illegal, and that the plaintiff's assignor was particeps criminis, and equal in guilt with the defendant. But whether the cause of action was based upon the contract, or upon the illegality of the contract, and in disaffirmance thereof, does not appear. The questions discussed in the lower courts have, however, been regarded as of sufficient importance to receive the consideration of this court, and as they were the only ones discussed at our bar, we may confine our observations to them without regard to the particular issue made by the pleadings.

It appears from the evidence that the plaintiff is the assignee of Mrs. E. Guion, a widow lady, who, in her search for a husband, sought the advice and aid of the defendant, who was the owner and publisher of a matrimonial journal called "The New York Cupid," and the proprietor of a matrimonial bureau in New York City. Mrs. Guion's testimony was to the effect that in June, 1886, she became a patron of the defendant's establishment, and paid the usual registration fee of five dollars; that she was introduced to thirty or forty gentlemen, but found none whom she was willing to accept as a husband; and that in June, 1887, for the purpose of stimulating the defendant's efforts in her behalf,

she paid him fifty dollars, whereupon there was executed the following instrument:

"June 2d, 1887.

"Due Mrs. Guion from Mr. Wellman fifty dollars (\$50.00), Aug. 15th, if at that time she is willing to give up all acquaintance with gentlemen who were introduced in any manner by H. B. Wellman. If Mrs. Guion marry the gentleman whom we introduce her to, an additional fifty dollars (\$50.00) is due Mr. Wellman from Mrs. Guion.

"(Signed) H. B. Wellman.
"E. Guion."

In August, 1887, Mrs. Guion, not finding a congenial companion among any of the men to whom she had been introduced, and claiming to be willing to give up all acquaintance with them, demanded from defendant the return of the money paid, which, being refused, the claim was assigned to plaintiff and this action was commenced.

The five learned judges who have delivered opinions in the case have agreed that the contract between the parties was void, and this conclusion appears to be amply supported by authority. 1 Story's Eq. Jurisprudence, §§ 260-264; 2 Pomeroy's Eq. Jurisprudence, § 931; Willard's Eq. Jurisprudence, 211; Bacon's Abridgment, title Marriage & Divorce, D.; Fonblanque's Eq. ch. 1, § 10; Boynton v. Hubbard, 7 Mass. 112; Crawford v. Russell, 62 Barb. 92.

Judge Story, after discussing the grounds upon which courts of equity interfere in cases of this kind, says: "It is now firmly established that all such contracts are utterly void as against public policy . . .," and Chief Justice Parsons said, in Boynton v. Hubbard, supra, that "these contracts are void . . . because they have a tendency to cause matrimony to be contracted on mistaken principles and without the advice of friends, and they are relieved against as a general mischief for the sake of the public."

The doctrine that marriage brokerage contracts are void is the outgrowth of the views and opinions of the English people upon the subject of the marriage relation, and the courts of England, for upwards of a century, have universally declared that the natural consequences of such agreements would be to bring about ill-advised, and, in many instances, fraudulent marriages, result-

ing inevitably in the destruction of the hopes and fortunes of the weaker party, and especially of women, and that every temptation in the exercise of undue influence in procuring a marriage should, therefore, be suppressed.

The defendant has, however, succeeded in the lower court upon the application of the rule that a court will not lend its aid to either of the parties to an illegal or fraudulent contract, either by enforcing its execution if it be executory, or by rescinding it if it be executed. Public policy has dictated the adoption of this rule, but it has its limitations, and when the parties are not equally guilty, or when the public interest is advanced by allowing the more excusable of the two to sue for relief, the courts will aid the injured party by setting aside the contract and restoring him, so far as possible, to his original position. 1 Pomeroy's Equity, § 403; 1 Story's Equity, § 300.

It is not sufficient for the defendant to show merely that the other contracting party is particeps criminis, but it must appear that both are equal in guilt unless the contract be malum in se, in which case the maxim ex dolo malo non oritur actio is of universal application.

This subject received very full consideration in the case of *Tracy* v. *Talmage* (14 N. Y. 162), and it was there said that unless the parties are *in pari delicto* as well as *particeps criminis*, the courts, although the contract is illegal, will afford relief to the more innocent party.

Upon the application of this doctrine, in *Mount* v. *Waite* (7 Johns, Rep. 433), premiums paid for the insurance of lottery tickets were recovered, the plaintiff being held not to be equal in guilt with the defendants.

In Wheaton v. Hibbard (20 Johns. Rep. 290) it was held that usurious interest paid by a borrower could be recovered independent of the statute, and that the maxim inter partes in pari delicto, potior est conditio defendentis did not apply, as the law considered the borrower the victim of the usurer, and Lord Mansfield laid down the rule that in transactions prohibited by statute for the protection of one set of men from another set of men the parties are not in pari delicto. Browning v. Morris, 2 Cowp. 790. See also Schroeppel v. Corning, 6 N. Y. 107, 115, 116.

It will appear from an examination of the authorities upon this subject, a very few only of which are cited, that courts, both of law and equity, have held that two parties may concur in an illegal act without being deemed in all respects in pari delicto. In many such cases relief from the contract will be afforded to the least guilty party when he appears to have acted under circumstances of imposition, hardship, or undue influence, and especially where there is a necessity of supporting public interests, or a well-settled policy of the law, whether that policy be declared in the statutes of the State or be the outgrowth of the decisions of the courts. Accordingly, many cases may be cited where relief has been granted from contracts which partook of the character of marriage brokerage agreements. The cases are collected in Pomeroy's Equity Jurisprudence, in a note to section 931; in Fonblanque's Eq. (B. I., ch. 4, §§ 10, 11), and Bacon's Abridament, title Marg. & Divrs. (541 et seq.), and need not be cited here. In two of the cases referred to, money paid under the contract was recovered back. Smith v. Bruning, 2 Vern. 392; Goldsmith v. Bruning, 1 Eq. Cases Abr. 89.

The question in this and kindred cases, therefore, must always be whether the parties are equal in guilt. Obviously cases might arise where this would clearly appear and where the court would be justified in so holding as a matter of law, as where there was an agreement between two, having for its purpose the marriage of one to a third party, the parties would be so clearly in paridelicto that the courts would not aid the one who had paid money to the other in the promotion of the common purpose, to recover it back. Such a case would partake of the character of a conspiracy to defraud. So if two parties entered into a partnership to carry on such a business as defendant conducted, the courts would not lend their aid to either to enforce the agreement between them.

But where a party carries on a business of promoting marriage as the defendant appears to have done, it is plain to be seen that the natural tendency of such a business is immoral, and it would be so clearly the policy of the law to suppress it, and public interest would be so greatly promoted by its suppression, that there would be no hesitation upon the part of the courts to aid the party who had patronized such a business by relieving him or her from all contracts made, and grant restitution of any money paid or property transferred. In that way only could the policy of the law be enforced and public interests promoted.

Contracts of this sort are considered as fraudulent in their character, and parties who pay money for the purpose of procuring a husband or wife will be regarded as under a species of imposition or undue influence. The subject is classed by all text writers under the head of constructive or implied fraud, and it is upon the application of rules which belong to that branch of the law that the cases have been decided to which I have referred.

We are of the opinion, therefore, that it was error to hold as a legal conclusion that the parties to the contract in question were equal in gnilt.

The learned General Term of the Common Pleas appeared to have considered that the voluntary character of Mrs. Guion's acts was decisive of this question and deprived her of the right of It is true there is no evidence of actual overrecovery. persuasion or undue influence. But at most the inferences to be drawn from these facts were for the jury. The prominent fact in the case is that such a place as the defendant maintained existed in the community, with its evil surroundings and immoral tendencies. What influence was exerted upon the mind of the widow by the mere fact of the existence of such a place to which resort could be had, cannot of course appear except by inference. But if the evidence was not sufficiently strong to authorize the court to hold as a question of law that the parties were not in pari delicto, it at least presented a question of mixed fact and law for the jury.

Our opinion is that the same reasons that have induced courts to declare contracts for the promotion of marriage void, dictate with equal force that they should be set aside and the parties restored to their original position. To decide that money could not be recovered back would be to establish the rules by which the defendant and others of the same ilk could ply their trade and secure themselves in the fruits of their illegal transactions.

We are of the opinion, therefore, that the Common Pleas erred

in reversing the order of the City Court, and that a new trial should have been granted.

The order appealed from should be reversed, and the order of the General Term of the City Court affirmed, with costs.

All concur. Order reversed.

BERNARD v. TAYLOR.

23 OREGON, 416. - 1893.

LORD, C. J. This was an action to recover the sum of five hundred and sixty dollars deposited with the defendant as a wager on the result of a foot race. The case was tried without the intervention of a jury, and the material facts as found by the court are: That the plaintiff deposited with the defendant the sum of five hundred and sixty dollars in gold for the benefit of one George Grant, and as a wager upon a foot race which said Grant and one Anderson were to run the next day at a place agreed upon; that at the time the said money was so deposited, it was understood by Grant and the defendant Taylor and the plaintiff that the money should be paid back to the plaintiff on his demand for the same at any time before the race should be run, which the defendant agreed to do; that before such race was run the plaintiff on two occasions demanded said money of the defendant, who refused to pay it back, but pretends that said race was run, and that Anderson was the winner, to whom he paid the money before the commencement of this action; that the race agreed to be run was not run, but that Grant, at the appointed time, refused to run, and Anderson ran over the course alone and was declared by the defendant to be the winner; that said pretended race was never intended to be a fair and honest race, and that plaintiff knew at the time he deposited his money with the defendant that the race was to be a "bogus race"; that the parties engaged in getting it up, namely, Grant, Anderson, and the defendant, wanted to "rope in" somebody; that it was understood that Grant was to win the race; that the plaintiff furnished the money and deposited it with the defendant as stakeholder for the benefit of Grant, in whom he had confidence at the time, but of whom, before the time appointed for the race to come off, he became suspicious; that he feared that he would lose the money, and thereupon, by reason of such suspicion, and by virtue of the agreement with the defendant, demanded of the defendant the return of said money, and that said Grant then and there, before the time of running the race had arrived, demanded of the defendant the repayment of the money to the plaintiff, etc. Substantially upon such findings, the court found as a conclusion of law that the plaintiff was entitled to judgment for the sum of five hundred and sixty dollars and interest, and for costs, etc. From this judgment the appeal has been brought to this court.

1. The first contention for the defendant is, that wagers or wagering contracts upon indifferent subjects are valid in this State by force of the common law, except when prohibited by There can be no doubt that wager contracts upon indifferent matters were valid at common law. Good v. Elliott, 3 T. R. 693; Jones v. Randall, 1 Cowp. 37; Da Costa v. Jones, 2 Cowp. 734; Bunn v. Riker, 4 Johns. 427 (4 Am. Dec. 292). But all wagers which tended to a breach of the peace, or to injure the feelings, character, or interests of third persons, or which were against the principles of morality, or of sound policy, were void at common law. 4 Kent's Com. 466; Greenhood, Pub. Pol. 226. And all wagers in contravention of the positive provisions of any statute are also void. Of late years, by legislation and judicial decision, the hostility to wagers of every nature has been marked. This is doubtless due to the increase of betting and the evil consequences resulting therefrom. As O'Neal, J., said: "Every bet tends directly to beget a desire of possessing another's money or property without an equivalent. Men acted upon by such influences easily become gamblers, and then the road to every other vice is broad and plain." Rice v. Gist, 1 Strob. (S. C.) 84. And the tendency of judicial opinion in repudiating all kinds of wagers is well illustrated in Love v. Harvey (114 Mass. 82), wherein Gray, C. J., says: "It is inconsistent with the policy of our laws and with the performance of duties for which courts of justice are established, that judges and juries should be occupied with every frivolous question upon

which idle and foolish persons may choose to lay a wager." Equally emphatic is Belford, J., in *Eldred* v. *Malloy* (2 Col. 321), wherein he says: "If we enter upon the work of settling bets made by gamblers in one case . . . we may despair of ever finding time for the dispatch of these weightier matters which affect the person and property rights of the respectable people in this territory. If the gate is once opened for this kind of litigation, it is more than probable we may be overrun with questions arising out of bets. The spirit of our laws discountenances gambling." Wagers are inconsistent with the established interests of society, and in conflict with morals of the age, and as such they are void as against public policy. In view of these considerations, we do not think that such transactions, though upon indifferent subjects, are valid in this State.

2. The next contention for the defendant is, that the alleged agreement was corrupt, illegal, and criminal in this, that it was in advance "fixed" that one of the parties should win, and that certain persons should lose their money; in other words, that the agreement had in contemplation "a job race." This, it is claimed, put the plaintiff in pari delicto with the defendant, and as a consequence he is entitled to the benefit of the rule potior est conditio possidentis. The general rule is, that the law will not interfere in favor of either party in pari delicto, but will leave them in the condition in which they are found, from motives of public policy. There is no doubt, where money has been paid on an illegal contract which has been executed, and both parties are in pari delicto, the courts will not compel the return of the money so paid. But the cases show that an important distinction is made between executory and executed illegal contracts. While the contract is executory, the law will neither enforce it nor award damages, but the party paying the money, or putting up the property, may rescind the contract and recover back his money. If the contract is already executed, nothing paid or delivered can be recovered back. This arises out of a distinction between an action in affirmance of an illegal contract and one in disaffirmance of it. In the former, such an action cannot be maintained, but in the latter, an action may be maintained for money had and received. The reason is, that the plaintiff's claim

is not to enforce, but to repudiate, an illegal agreement. Wharton, Con. 354. In such case there is a locus pænitentiæ; the wrong is not consummated, and the contract may be rescinded by either party.

In Edgar v. Fowler (3 East, 225) Lord Ellenborough said: "In illegal transactions the money has always been stopped while it is in transitu to the person entitled to receive it." As Lord Justice Mellish said: "To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps. If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done." Taylor v. Bowers, 1 Q. B. Div. 291. In Hastelow v. Jackson (8 Barn. & Cress. 221), which was an action by one of the parties to a wager on the event of a boxing match, commenced against the stakeholder after the battle had been fought. Littledale, J., said: "If two persons enter into an illegal contract and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards." v. Bickmore, 4 Taunt. 474; Tappenden v. Randall, 2 Bos. & Pul. 467; Lowry v. Bourdien, 2 Doug. 468; Munt v. Stokes, 4 T. R. 561; Utica Ins. Co. v. Kip, 8 Cow. 20; Merritt v. Millard, 4 Keys (N. Y.), 208; White v. Franklin Bank, 22 Pick. 181; O'Bryan v. Fitzpatrick, 48 Ark. 490. "And this rule," says Mr. Justice Woods, "is applied in the great majority of the cases, even when the parties to an illegal contract are in pari delicto, because the question which of two parties is the more blamable is often difficult of solution, and quite immaterial." Spring Co. v. Knowlton, 103 U.S. 60. The object of the law is to protect the public, and not the parties. This is upon the principle that it best comports with public policy to arrest the illegal transaction before it is consummated. Stacy v. Foss, 19 Me. 335 (36 Am. Dec. 755).

3. It only remains to apply these principles to the facts.

These show that the plaintiff was cognizant that the race had been fixed in advance - that one of the parties should win, and that certain other persons should lose their money -- that it was a bogus race, and the arrangement based upon it corrupt, and designed to cheat and defraud the other parties; but, at the same time, they show that he repented and repudiated the transaction before it was consummated, by demanding the return of his money the evening of the day before the race, and on the day of the race, but before it was to come off, and that the defendant refused to pay it back, and that he afterwards forbade the defendant to pay said money to any other person than himself. He availed himself of the opportunity which the law affords a person to withdraw from the illegal contract before it has been executed; he repented before the meditated wrong was consummated, and twice demanded to withdraw his money, and thereby rescinded the con-To allow the plaintiff to recover does not aid or carry out the corrupt and illegal transaction, but the effect is to put the parties in the same condition as they were before it was determined upon. By allowing the party to withdraw, the contemplated wrong is arrested, and not consummated. This the law encourages, and no obstacle should be thrown in the way of his repentance. Hence, if the plaintiff retreated before the bet had been decided, his money ought to have been returned to him, and in default of this he is entitled to recover.

There was no error, and the judgment must be affirmed.

